

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0013

INTERLOCUTORY APPEAL UNDER CPR RULE 62.10

BETWEEN:

JTRUST ASIA PTE. LTD.

Appellant

and

**(1) MITSUJI KONOSHITA
(2) A.P.F. GROUP CO. LTD. (IN RECEIVERSHIP)**

Respondents

and

**(1) NICHOLAS JAMES GRONOW
(2) DAVID JOHN AYRES**

Receivers

and

SHOWA HOLDINGS CO. LTD.

Intervenor

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Vernon Flynn, QC. with him Mr. Peter Ferrer, Ms. Marcia McFarlane and Ms. Jhneil Stewart for the Appellant
Mr. Robert Nader for the Respondents
Mr. Adrian Francis and Ms. Andrea Walters for the Intervenor
Ms. Yegâne Güley holding a watching brief for the Receivers

2021: October 8;
2022: May 11.

Commercial appeal – Interlocutory appeal – Receivership – Section 24(1) of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80 – Part 51 of the Civil Procedure Rules 2000 – Whether learned judge erred in finding that the Receivership Order in this case operated as an injunction – Cross-undertaking in damages – Whether standard requirements for a cross-undertaking in damages for an injunction order applies to a receivership order – Whether learned judge erred in finding that receivership order was ancillary to freezing order – Whether learned judge should have required JTrust to offer a cross-undertaking in damages in support of the receivership – Whether learned judge erred in implying a cross undertaking in damages in receivership order

JTrust Asia PTE, Ltd. (“JTrust”) invested substantial sums of money with A.P.F. Group Co. Ltd. (In Receivership) (“APF”), during the period leading up to 2017. Differences among the parties emerged and in December 2017, JTrust commenced proceedings in the Commercial Court of the Virgin Islands against APF and Mr. Mitsuji Konoshita, APF’s director and majority shareholder, seeking the recovery of the monies invested.

On 24th December 2017, JTrust obtained a freezing order against the APF and Mr. Konoshita (“the Respondents”) restraining them from disposing of their assets up to a value of \$45 million until the determination of the claim (“the Freezing Order”). The Freezing Order contained the usual cross-undertaking in damages by JTrust to compensate the Respondents for any loss that the court orders it to pay to the Respondents. The Freezing Order also obliged the Respondents to disclose details of their assets by 4:00 pm on 27th December 2017. The Respondents did not comply with the disclosure order and JTrust applied for the appointment of receivers of 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 5th July 2018, Adderley J appointed Nicholas James Gronow and David John Ayers (“the Receivers”) as joint receivers of APF (“the Receivership Order”). The issue of a cross-undertaking in damages was not raised at the hearing and learned counsel appearing for JTrust did not offer a cross-undertaking in respect of the actions of the Receivers, nor was he invited to offer one. As a result, the Receivership Order did not contain a cross-undertaking.

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 was included in or was implied in the Receivership Order since the date when it was made. Alternatively, that JTrust must file with the court, within 48 hours, a written undertaking in similar terms and subject to the conditions set out in the notice of application. The application was heard by Wallbank J who ordered that the cross-undertaking in damages be implied in the Receivership Order. In coming to his decision, the learned judge held that: (i) the Receivership Order operates as a form of injunction; (ii) the Receivership Order was ancillary to the freezing order; (iii) the cross-undertaking in damages given by JTrust should be implied in the receivership order; (iv) Adderley J should have considered requiring a cross-undertaking in damages from JTrust when the Receivership Order was made; and (v) JTrust should pay the costs of the Respondents and Showa of the application.

JTrust, being dissatisfied with these findings and the judge's order, appealed to this Court relying on five grounds of appeal. The Respondents and Showa filed counter-notices of appeal seeking to uphold the judge's decision on the ground found by the judge and on other grounds. The main issues for this Court's determination are: (i) whether the learned judge erred in finding that the Receivership Order in this case operated as an injunction; (ii) whether the standard requirements for a cross-undertaking in damages for an injunction order applies to a receivership order; (iii) whether the learned judge erred in finding that the Receivership Order was ancillary to the Freezing Order; (iv) whether Adderley J should have required JTrust to offer a cross-undertaking in damages in support of the receivership; (v) whether Wallbank J erred in implying a cross undertaking in damages in the Receivership Order.

Held: allowing the appeal; setting aside the order of Wallbank J dated 15th April 2021; and making the orders at paragraph 66 of this judgment, that:

1. Where a receivership order has the effect of interfering with the assets of the respondent, or his control of those assets, such an order can have the effect of an injunction and as such the 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 attract 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.

Masri v Consolidated Contractors International Company SAL & Anor [2007] EWHC 3010 (Comm) applied; **Steven Gee, QC: Commercial Injunctions** (6th edn.) Sweet & Maxwell (2016) applied; **Re Chime Corporation Limited** HCMP No. 4146/2001 (unreported); **Akai Holdings Limited (in compulsory liquidation) Wing and others** HCCL 37/2005 (unreported) considered.

2. 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. The Receivership Order was therefore ancillary to or in support of the Freezing Order and it does not matter that it was made after the Freezing Order. Additionally, the Receivership Order though ancillary to the Freezing Order, is a separate 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.
3. In the Virgin Islands, 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 a protective receiver *ex parte* or *inter partes* before the trial

of the action; or at any time, including after judgment, when the appointment will result in losses to the defendant company or a loss of control of the assets or affairs of the company.

National Australia Bank Ltd v Bond Brewing Holdings Limited 169 CLR 271 applied; **Steven Gee, QC: Commercial Injunctions** (6th edn.) Sweet & Maxwell (2016) applied; **Masri v Consolidated Contractors International Company SAL & Anor** [2007] EWHC 3010 (Comm) applied.

4. Upon considering that, a cross-undertaking in damages is not required for every receivership order, and that it is in the judge's discretion whether to require such an undertaking based on all the circumstances of the case, Adderley J cannot be faulted for not considering the need for a cross-undertaking, especially where there was complete silence on the matter by the parties at the hearing.
5. 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. A cross-undertaking in damages cannot be imposed by the court. The applicant for an injunction or receivership must offer the undertaking or be willing to submit to it. 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 challenge from the Respondents, and (c) there was a delay of three years before asking the Court to impose one, the learned judge erred in implying the cross-undertaking in the Receivership Order. The learned judge should have enquired of counsel at the hearing whether JTrust was offering a cross-undertaking in damages for the Receivership Order.

Birch v Birch [2017] UKSC 53; **Hoffmann-la-Roche & Co. AG. and others v Secretary of State for Trade and Industry** [1975] AC 295.

6. The Court can in the exercise of its discretion, require an applicant for a receivership order to offer a cross-undertaking in damages, and if the applicant does not proffer such an undertaking, the Court may not make the appointment. In this case, the receivership was in place and the issue is whether it should continue without a cross-undertaking. This Court is empowered to invite JTrust to offer a cross-undertaking and to make such order as it sees fit including setting aside the receivership. 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.

Hoffmann-la-Roche & Co. AG. and others v Secretary of State for Trade and Industry [1975] AC 295; **National Australia Bank Ltd v Bond Brewing Holdings Limited** 169 CLR 271 applied.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal against the judgment and order of the learned trial judge, Wallbank J, delivered on 15th April 2021 declaring that the cross-undertaking in damages given by the appellant, JTrust Asia PTE, Ltd (“JTrust”), in connection with a freezing order made on 24th December 2017, be implied in the order of the court below dated 5th July 2018 appointing receivers of the second respondent, A. P. F. Group Co. Ltd., a Virgin Islands company (“APF”).

Background

- [2] JTrust is a company incorporated in Singapore. Its major asset is its majority shareholding in Showa Holdings Co. Ltd. (“Showa”). During the period leading up to 2017, JTrust invested substantial sums of money (approximately \$95 million) with APF. The first respondent, Mr. Mitsuji Konoshita (“Mr. Konoshita”) is a director and majority shareholder of APF. Differences developed among the parties and on 21st December 2017, JTrust commenced proceedings in the Commercial Court of the Virgin Islands against Mr. Konoshita and APF seeking the recovery of the monies invested. Mr. Konoshita and APF are referred to together in this judgment as “the Respondents”.
- [3] JTrust also filed claims against the Respondents and other persons in the courts of Singapore (“the Singapore claim”) and Thailand (“the Thai claim”).
- [4] On 24th December 2017, JTrust obtained a freezing order against the Respondents restraining them from disposing of their assets up to a value of \$95 million until the determination of the claim (“the Freezing Order”). The cap on the Freezing Order was later reduced to \$45 million. The Freezing Order contained the usual cross-undertaking in damages by JTrust to compensate the Respondents for any loss that

the court orders it to pay to the Respondents. The cross-undertaking was proffered to the court in the affidavit of Mr. Shigeyoshi Asano, a director of APF, in paragraph 59 of his affirmation filed on 21st December 2017 in support of the application for the Freezing Order, as follows: “I confirm that [APF] is willing to give the usual cross-undertaking in damages.” The cross-undertaking was included in the Freezing Order in the following terms: “If the Court later finds that this order has caused loss to any of the Defendants and decides that such Defendant or Defendants should be compensated for that loss, [JTrust] will comply with any order that the Court may make.”

[5] The Freezing Order contained a term for the Respondents to disclose details of their assets by 4:00 pm BVI time on 27th December 2017. The Respondents did not comply with this order and on 4th January 2018, JTrust applied for an order under part 51 of the **Civil Procedure Rules 2000** (“CPR”) for the appointment of a receiver of APF pending the resolution of the claim or further order, and to continue the Freezing Order. The application was supported by two affidavits of Mr. Johime Trevor Lee, a lawyer in the firm of Harneys who represent JTrust. Mr. Lee’s affidavits were not included in the record of appeal but it is not disputed that his evidence refers to and incorporates the affidavit of Mr. Asano, where the cross-undertaking was offered in support of the Freezing Order. On 13th February 2018, Adderley J varied the Freezing Order and listed the matter for a further hearing on 19th February 2018. JTrust did not press for the appointment of receivers at the hearing on 19th February 2018. The disclosure obligations remained unfulfilled and on 4th May 2018, JTrust filed a certificate of urgency to renew the application for the appointment of receivers. The certificate of urgency stated that the receivership application was brought “...to ensure the status quo is preserved until the substantive dispute can be resolved and to facilitate the policing of the Freezing Order...”.

[6] A further hearing was held on 5th July 2018 when Adderley J made the receivership order appointing Nicholas James Gronow and David John Ayres (“the Receivers”)

as joint receivers of APF (“the Receivership Order”) “for the purpose of identifying, protecting and (if appropriate) recovering the assets of the [APF] and the value of such assets with immediate effect pending the resolution of the claim herein.”¹ The learned judge considered the issue of security to be provided by receivers as required by rule 51.4 of CPR and decided to waive the requirement for security based on the fact that the Receivers, or at least one of them, is a licensed insolvency practitioner in the Virgin Islands and was covered by insurance. Learned counsel appearing for JTrust did not offer a cross-undertaking in damages in respect of the actions of the Receivers, nor was he invited to offer one. The issue of the cross-undertaking in damages was not raised at the hearing, nor at any of the later hearings in the lower court and the Court of Appeal dealing with the receivership. The Receivership Order did not contain a cross-undertaking.

- [7] On 16th April 2019, Adderley J stayed the claim against the Respondents and set aside service of the claim on Mr. Konoshita on the ground that the Virgin Islands is not the forum conveniens for the trial of the claim. However, he continued the Freezing Order and the Receivership Order until further order, presumably in support of the ongoing proceedings in Singapore and Thailand.
- [8] The Singapore claim was dismissed by the Singapore High Court on 12th February 2020 after trial and the domestic freezing order previously granted by that Court was discharged. JTrust appealed against the dismissal of the claim and the discharge of the freezing order and on 1st June 2020 the Singapore Court of Appeal reinstated the freezing order pending the determination of the appeal.
- [9] Following the dismissal of the Singapore claim the Respondents applied to the Commercial Court on 19th February 2020 to discharge the Freezing Order and the Receivership Order. The application was dismissed by Wallbank J on 19th August 2020. The Respondents’ appeal to the Court of Appeal against Wallbank J’s refusal

¹ Record of appeal page 289.

to discharge the orders was dismissed and the orders are in place until further order of the court.

[10] On 30th November 2020, the Receivers obtained an order sanctioning their plan to remove the existing board of directors of the intervenor, Showa, a subsidiary of APF, and appoint a new board of directors of the company. Showa is a part of the Showa Group which operates multiple businesses in Asia and has over six thousand employees. The Respondents and Showa claim that the reconstitution of the board of directors of Showa by the Receivers will have disastrous consequences for the company. The Court of Appeal dismissed an appeal against the sanctions order. Therefore, the Receivers have sanction to proceed with the reconstitution of the board of directors of Showa.

[11] On 19th February 2021, the Respondents applied for a declaration that the cross-undertaking in damages given by JTrust in the Freezing Order was included in or was implied in the Receivership Order since the date when it was made and covers any loss caused to the Respondents, or to any other person including, but not limited to, Showa, if the court decides that the Respondents or such person or persons should be compensated for the loss. Alternatively, that JTrust must file with the court, within 48 hours, a written undertaking in similar terms and subject to the conditions set out in the notice of application.

[12] The application was heard by Wallbank J on the 14th and 15th of April 2021. The learned judge granted leave to Showa to be heard on the application and ordered that the cross-undertaking in damages be implied in the Receivership Order. In coming to his decision, the learned judge made the following important findings:

- (i) The Receivership Order operates as a form of injunction.

- (ii) The Receivership Order was ancillary to the freezing order and the cross-undertaking in damages given by JTrust should be implied in the Receivership Order.
- (iii) Adderley J should have considered requiring a cross-undertaking in damages from JTrust when the Receivership Order was made.
- (iv) JTrust should pay the costs of the Respondents and Showa of the application.

JTrust, being dissatisfied with these findings and the judge's order, appealed to this Court. The notice of appeal lists five grounds of appeal which I deal with below. The Respondents and Showa filed counter-notices of appeal seeking to uphold the judge's decision on the ground found by the judge and on other grounds. I will deal with the grounds of appeal and of the counter-notices below, but before doing so, I will mention briefly some of the basic principles relating to receiverships.

General principles regarding receivers

- [13] The power to appoint receivers in the Virgin Islands is statutory. The general power is found in section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**² which provides that the High Court may appoint a receiver by an interlocutory order "...in all cases in which it appears to the Court or Judge to be just or convenient...".
- [14] The procedural rules for appointing receivers are contained in part 51 of the CPR. Part 51 deals with the appointment of receivers on an interim basis to protect assets that are the subject of the receivership (protective receivers) and receivers appointed after judgment as a form of execution of the judgment. The application must be supported by evidence on affidavit. In urgent cases, the application may be made without notice if it includes an application for an interim injunction to restrain

² Cap. 80, the Laws of the Virgin Islands.

the judgment debtor or respondent from assigning, charging or otherwise dealing with any property that is the subject of the application.

- [15] A receivership is an invasive and draconian remedy and is usually made on notice to the respondent. The application in this case was made on notice to the Respondents.
- [16] Rule 51.4 states that the general rule is that a person may not be appointed as a receiver until he has given security, but the court may dispense with security. In this case, Adderley J considered the issue of security and dispensed with it.³
- [17] The application in this case was made on notice to the Respondents under CPR part 51, and the inherent jurisdiction of the court, for the appointment of interim receivers to protect the assets of AFP pending the resolution of the BVI claim. As stated above, the BVI claim was stayed on 16th April 2019, but the Freezing Order and the Receivership Order were continued in support of the proceedings in Singapore and Thailand.

The grounds of appeal

Ground 1 – Receivership as an injunction

- [18] The first ground of appeal is that:
- “The learned judge wrongly held that a receivership order is a form of injunction and therefore the standard requirements for cross-undertaking in damages from an applicant for a freezing order ought to apply to a receivership order.”

Two issues arise from this ground of appeal, namely, did the judge treat the Receivership Order as a form of injunction and, in any event, whether the standard requirements for a cross-undertaking in damages for an injunction order applies to a receivership order.

³ See paragraph 6 above.

[19] The relevant part of the transcript of Wallbank J's oral judgment is:

"I accept, contrary to the very powerful submission that Mr. Ferrer (counsel for JTrust) has made, that the receivership order is a form of injunction in its effect as was indeed remarked in the Masri case⁴ ...at paragraph 114 where it was stated that a receivership order operates as an injunction. Now, looking at the terms of the present receivership order that we are dealing with, that also operates as an injunction. So what I am doing there is I am taking the specific principle which is an English law principle and applying it here in the BVI and then going one step further and looking at the terms of our receivership order and concluding that on its own terms it operates as an injunction... Now, I come back to the point, therefore, that this particular receivership order operates as an injunction and it is, I accept that it is a form of injunction."⁵

It is apparent from the language of the learned judge that he treated the Receivership Order as a form of injunction. However, the judge did not make a finding that a receivership order is an injunction, only that in this case the Receivership Order operated as an injunction and was a form of injunction. Having found that the Receivership Order was a form of injunction, Wallbank J proceeded to treat the requirement for a cross-undertaking in damages as if he was dealing with an injunction.

[20] Learned counsel for JTrust, Mr. Vernon Flynn QC, submitted that Wallbank J erred in treating the receivership order as an injunction and in applying the principles relating to cross-undertakings in damages in injunctions to the Receivership Order. He acknowledged that the standard practice regarding the grant of an interim injunction required the applicant to offer a cross-undertaking in damages as the price of obtaining the order *ex parte* or *inter partes* before trial, and in the absence of such an offer, the court would not grant the injunction. However, this practice does not apply to the appointment of a receiver. A receiver is not representative of the person applying for the appointment. He is an officer of the court and, in the

⁴ Masri v Consolidated Contractors International Company SAL & others [2007] EWHC 3010 (Comm) ("Masri").

⁵ Record of Appeal – Tab 4 page 117.

Virgin Islands, a licensed insolvency practitioner. He is only required to give an undertaking in two situations, namely, when the application is made *ex parte*, or if the receivership restrains the affected company from dealing with its assets. This was not such a case. The restrictions on dealing with assets were imposed by the Freezing Order, not the receivership, and the learned judge was wrong to treat **Masri** as authority for treating the Receivership Order as an injunction, thereby finding that the cross-undertaking in damages in the Freezing Order should be included in the Receivership Order. The receivership in this case was a purely protective measure.

[21] Learned counsel for the Respondents, Mr. Robert Nader, and for Showa, Mr. Adrian Francis, disagreed with this interpretation of the facts and the law. They submitted that it is the usual practice to include a cross-undertaking in damages in a receivership order and that the receivership order in this case is an injunction that restrained APF from controlling its affairs and dealing with its assets. They relied on **Masri** and other cases as examples of receivership orders that operated as and were treated as injunctions that required cross-undertakings in damages.

[22] **Masri** is a decision of Gloster J (as she then was) sitting in the Queen's Bench Division in England. The case has a long and complicated history involving intense battles between Mr. Munib Masri and the defendants resulting in a substantial damages award in favour of Mr. Masri. When the matter came before Gloster J there were four applications before the court, all to do with attempts to enforce the judgment debt against the defendants. The second application is relevant to this appeal. It was for the appointment of a receiver to collect and retain, for the purposes of execution, certain oil revenues due to one of the defendants (CCOG) from a third party. The relief sought in this application included an application for an injunction requiring CCOG and its officers to co-operate with the receiver by, among other things, providing information regarding the oil revenues.

[23] Gloster J noted at paragraph 109 of the judgment that the receivership order sought was both protective by receiving and retaining the oil revenues, and by way of equitable execution as the collected revenues were intended to be used to assist in the enforcement of payment of the judgment debt. I note that in either case, the application was for the appointment of a receiver post judgment, with an ancillary order in the form of an injunction for CCOG and its officers to co-operate with the receiver. The respondents in the instant appeal rely on the statement of the learned judge at paragraph 114 where she said –

“The appointment of a receiver by way of equitable execution may be made wherever it is just or convenient so to do, over assets of a company including future debts ...The effect of such an appointment is as follows: first, it operates as an injunction restraining the defendant (here CCOG), subject to the jurisdiction of the court, from itself dealing with the asset in question;” (underlining added)

Gloster J went on to find that –

“[I]n my judgment, it is appropriate that the claimant should give such an undertaking in relation to the orders to be made on the Receivership Application, where the relief (if it takes effect) may be extensive and there is potential, at least, for interference with CCOG’s relationships with his 3rd party customers.”

The Respondents and Showa submitted that **Masri** is clear authority that a receivership order is an injunction and as such the applicant should provide a cross-undertaking in damages. In so far as the submission is that a receivership order is always an injunction, I do not accept it. However, if the submission is that where a receivership order has the effect of interfering with the assets of the respondent, or his control of those assets, I agree that such an order has the effect of an injunction and as such the applicant must offer a cross-undertaking in damages. An undertaking will also be required, as suggested by Steven Gee QC,⁶ where the application is made without notice or *inter partes* before judgment.

⁶ Steven Gee, QC: Commercial Injunctions (6th edn.) Sweet & Maxwell (2016) (“Gee”).

[24] Mr. Francis also relied on two decisions of the High Court of Hong Kong. Firstly, **Re Chime Corporation Limited**⁷ where Kwan J in dealing with an *inter partes* application for interim receivers said –

“The power to appoint receivers on an interlocutory application is discretionary to be exercised flexibly on a similar basis to that of an interlocutory injunction, and the principles in *American Cyanamid Co v Ethicon*...”

[25] Secondly, **Akai Holdings Limited (in compulsory liquidation) Wing and others**⁸ where Stone J rejected a submission by counsel that there is a fundamental difference between the principles applicable to the grant of a Mareva relief and an application for the appointment of a receiver “...in a case such as this.”⁹ He went on to agree with the view of Kwan J in the **Re Chime** case as set out in the preceding paragraph, that American Cyanamid-like principles apply in considering an application for a receiver.

[26] I accept that in **Masri**, Gloster J found that the receivership order in that case operated as if it was an injunction and applied the principles relating to cross-undertakings in damages in injunction applications to the receivership. But that does not mean that a receivership order is an injunction in every case thereby attracting the principles relating to cross-undertakings in damages for injunctions in all receivership orders. The cases from the High Court of Hong Kong cited by Mr. Francis do not advance the matter any further.

[27] In summary, I find that the learned judge did not err in finding that the Receivership Order in this case operated as an injunction and that as a result, the principles relating to cross-undertakings in damages on the grant of an injunction apply. The judge’s finding should not be taken as deciding that a receivership order always has the effect of an injunction and/or should always include a cross undertaking in damages. Each case must be decided on its own facts.

⁷ HCMP No. 4146/2001 (unreported).

⁸ HCCL 37/2005 (unreported).

⁹ Ibid at paragraph 45.

Ground 2 – The learned judge erred in finding that the Receivership Order is ancillary to the Freezing Order

- [28] JTrust complained in the second ground of appeal that Wallbank J erred by finding that the Receivership Order was ancillary to the Freezing Order and reached that conclusion without being taken to the authorities by the respondents' counsel and without any consideration of what ancillary means in the context of this case.
- [29] Mr. Flynn QC relied on a passage from **Gee** to the effect that an injunction is granted as ancillary to the appointment of a receiver by way of equitable execution, which is the reverse of what happened in the instant appeal. I note also that the disclosure injunction that was granted in **Masri** was ancillary to the appointment of the receiver. However, I do not think this makes a difference. 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. The Receivership Order was therefore ancillary to or in support of the Freezing Order and it does not matter that it was made after the Freezing Order. The statement in **Gee** does not shut out the possibility of a receivership order being made in support of an injunction.
- [30] Mr. Flynn QC also submitted that if the Receivership Order is ancillary to the Freezing Order a separate undertaking in damages in the Receivership Order is not necessary and the Respondents can rely on the undertaking in the Freezing Order. Mr. Flynn QC did not support this submission with authorities. This submission may be correct depending on the facts, but it does not answer the primary question of whether a separate cross-undertaking in damages should be included in the Receivership Order. The Receivership Order was made by the lower court and affirmed by the Court of Appeal. Though made in support of the Freezing Order, it is a separate 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.

[31] I would dismiss this ground of appeal.

Grounds 3, 4 and 5 – the nature of the cross-undertaking, the finding that it is implied in the Receivership Order and related issues

[32] Grounds 3, 4 and 5 will be considered together because they deal with the central issues in this case of:

- (a) The law and practice in the Virgin Islands relating to cross-undertakings in damages for freezing orders and receivership orders;
- (b) Whether Adderley J should have required JTrust to offer a cross-undertaking in damages in support of the receivership;
- (c) Whether Wallbank J erred in implying a cross undertaking in damages in the Receivership Order.

Cross-undertakings in damages

[33] A cross-undertaking in damages is a 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. The undertaking is given to the court, not the respondent. Unless the undertaking is provided, the respondent will not be able to obtain compensation for the loss caused by the court order, unless he can show a cause of action for damages.¹⁰ The undertaking is different from the security required of a receiver by CPR part 51.3. The security covers losses caused by improper or negligent acts of the receiver regardless of whether or not he should have been appointed by the court.

¹⁰ Steven Gee: Commercial Injunctions (6th edn.) para 11.001.

[34] It is common ground among the parties that an applicant for an interim injunction must offer a cross-undertaking in damages. It is the price that the applicant pays for being granted interim relief. On the other hand, it is heavily disputed whether such an undertaking is required for the appointment of an interim or protective receiver. The Respondents and Showa submit that it is standard practice to include such an undertaking in the appointment of a receiver. They relied primarily on a passage from **Commercial Injunctions** by Steven Gee QC,¹¹ **Masri**, and a decision from the High Court of Australia in **National Australia Bank Ltd v Bond Brewing Holdings Limited**.¹²

[35] The passage from **Gee** is -

“If security is not to be required from the receiver before he takes up his appointment, then ordinarily the applicant will be required to furnish an undertaking to the court to be answerable for all the funds or other assets obtained or collected by the receiver. The applicant will in any event be required to furnish an undertaking in damages on an application without notice or *inter partes* before judgment”¹³

Learned counsel submitted that this passage illustrates the point that a cross-undertaking in damages is required for the appointment of an interim receiver before judgment (whether appointed *ex parte* or *inter partes*), and also because the receivership interferes with AFP’s main asset, its interest in Showa.

[36] **Masri** is an example of a cross-undertaking in damages being required for a receiver appointed post-judgment in the execution of the judgment. The receiver was appointed after judgment to collect and retain monies due to the judgment debtor to assist in the execution process. As stated above,¹⁴ Gloster J found that the receivership operated as an injunction and in the circumstances a cross-undertaking was appropriate.

¹¹ 6th ed. 2016.

¹² 169 CLR 271.

¹³ Steven Gee, QC: *Commercial Injunctions* (6th edn.) Sweet & Maxwell at paragraph 16-031.

¹⁴ *Masri v Consolidated Contractors International Company SAL & others* [2007] EWHC 3010 (Comm)

[37] The decision in **National Australia Bank Ltd v Bond Brewing Holdings Ltd** is instructive on the circumstances when it is appropriate for the court to require a cross-undertaking in damages on the appointment of a receiver. It is a decision of the High Court of Australia refusing an application for special leave to appeal against a decision of the Full Court of the State of Victoria setting aside the appointment of a receiver by a judge of the trial court.¹⁵ The first instance judge (Beach J) had appointed the receiver on an *ex parte* application without requiring a cross-undertaking in damages from the applicant. In setting aside the appointment, the Full Court (Kaye, Murphy and Brooking JJ), after finding that the receivership operated as an injunction,¹⁶ stated-

“In any event, if any case for the interim or interlocutory appointment of receivers and managers of the undertakings and assets was made out, the usual undertaking would have to be exacted, and justice would require that the undertaking attach to the original appointment as well as to any order modifying the original order. The argument on the appeal has proceeded on the basis that the respondents are not willing, in order to keep the receivers in possession, to give an undertaking as to damages which will protect the appellants against the consequences of the orders of 29 December and 9 February. To preserve the receivership without a satisfactory undertaking as to damages is unthinkable.”¹⁷ (emphasis added)

[38] The applicants applied to the High Court for special leave to appeal against the decision of the Full Court of Victoria. In dismissing the application and affirming the Full Court’s setting aside of the receivership, the High Court (Mason CJ, Brennan and Deane JJ) made the following important findings –

“7. Further, and more importantly, the primary issue on the appeal to the Full Court was whether the primary judge had been in error in refusing to vacate or rescind the orders of 29 December 1989 appointing receivers. Those orders had been made *ex parte* and without any undertaking as to damages being proffered or required. It is clear that they should not have been made in those circumstances. The orders should have been rescinded or vacated when the matter came again before the learned primary judge, in the continued absence of any proffered undertaking as to damages even at that stage.

¹⁵ 169 CLR 271.

¹⁶ *Ibid* page 144.

¹⁷ 169 CLR 271 at page 152.

8. The damage to be apprehended by the making of an order for the appointment of a receiver and manager is not so much that the receiver and manager may so exercise his powers as to occasion loss in the business to which he has been appointed. It consists of the consequences flowing from the fact of appointment and of the defendant's loss of "its title to control its assets and affairs" (the phrase of Viscount Haldane LC. in *Parsons v. Sovereign Bank of Canada* (1913) AC 160 at p 167).

9. Where damage of those kinds is to be apprehended as flowing from the appointment of a receiver by interlocutory order, consideration must be given to requiring, from the party seeking the order, at least some appropriate undertaking as to damages in the event that the appointment is ultimately shown to be unjustified.

10. In the present case, where the judge at first instance was prepared to appoint receivers and managers over the whole of the assets and undertakings of the respondent companies on the application of unsecured creditors, it was clear that some such undertaking was an essential condition to the making or the continuation of an order."¹⁸

[39] I extract from these principles that where a receiver is appointed, whether *ex parte* or *inter partes*, and there are consequences flowing from the appointment including the respondent's loss of control of the affairs and assets of his business, the appointment should include a cross-undertaking in damages.

[40] **National Australia Bank** is a decision of the apex court of Australia which, though not binding on this Court, is highly persuasive, and it is no less so because it is a decision on an application for special leave to appeal. The principles in paragraphs 7 to 10 of the judgment are consistent with the position on the English and BVI law. In fact, the case is cited by the learned editors of **Commercial Injunctions** in the passage cited at paragraph [35] above dealing with the requirement for cross-undertakings in receiverships.

[41] Mr. Flynn QC invited this Court not to follow the decision in **National Australia Bank Ltd**, or to treat it as a decision on its own facts and not laying down any general principles. He submitted that the restrictions on the defendant company (Bond

¹⁸ [1900] HCA 10 at paragraphs 7-10.

Brewing Holdings Limited) and the loss of control of its assets and affairs were caused by the appointment of the receiver, whereas in the instant appeal the potential loss of control of APF and its main asset, Showa, were caused and/or continues to be caused by the Freezing Order and not the appointment of the Receivers. Therefore, a cross-undertaking is not needed for the Receivership Order. I do not agree with this submission. Firstly, **National Australia Bank Ltd** itself recognises that the loss of control of the defendant company by the appointment of the receiver is itself a consequence that should be covered by a cross undertaking in damages.¹⁹ There has been such a loss in this case. The Respondents have lost control of both APF and Showa by the appointment of the Receivers who have taken control of the board of directors of APF and have sanction to take control of Showa. Secondly, it would be very difficult for this Court at this stage to decide which consequences and losses have been caused or will be caused by the Freezing Order or the Receivership Order.

[42] Mr. Flynn QC's further submission that this Court should accord less weight to the judgment of the High Court of Australia because it is a decision on an application for special leave to appeal is without merit. The judgment is well reasoned by a highly respected court and deals adequately with important issues that are relevant to this appeal.

[43] Having reviewed the authorities and the submissions of counsel, I am satisfied that an applicant for the appointment of a receiver should provide a cross undertaking in damages in the following situations:

- (a) When the application is being made for the appointment of a protective receiver *ex parte* or *inter partes* before the trial of the action; or
- (b) At any time, including after judgment, when the appointment will result in losses to the defendant company or a loss of control of the

¹⁹ 169 CLR 271 at paragraph 8 which is set out in paragraph [38] of this judgment.

company. **Masri** is an example of the appointment of a receiver in this situation.

Standard practice

- [44] The findings in the preceding paragraphs are to the effect that a cross-undertaking in damages is required for the appointment of a receiver in certain circumstances. There is no finding to the effect that a cross-undertaking is required for every appointment of a receiver. It is not the appointment of the receiver that triggers the need for the undertaking, but the consequences of the appointment. At least in theory, if the receiver is appointed purely for the purpose of holding the balance of power or taking charge of an asset without affecting the affairs of the company, there would be little or no potential consequences to the company and an undertaking in damages would not be necessary. I say in theory because counsel has not brought to the Court's attention a case of a purely protective order where the court dispensed with the need for a cross-undertaking on that ground. What is more to the point is a statement by Jack J in January 2020 in **VTB Bank (Public Joint Stock Company) v Miccross Group Ltd and Taurus Ltd**²⁰ where, after dealing with the difference between interim and final orders for the appointment of receivers, he continued –

“In some cases it can be difficult to distinguish between interim and final orders. The wording of the substantive elements of the two types of orders appointing a receiver is identical. It is true that the interim form of the order will also contain a cross undertaking in damages by the applicant for an order, but this is not invariable.”²¹ (emphasis added)

- [45] Upon considering the statement by Jack J, combined with part 51 of the CPR which requires security to be given on the appointment of a receiver, (but which does not mention the need for a cross-undertaking in damages), and the absence of any Eastern Caribbean authority suggesting that the undertaking must be given in every case of the appointment of a receiver, I am not satisfied that the practice in the Virgin Islands is to require an undertaking by the applicant in every application for the appointment of a receiver. Each case must depend on its own facts and it is within

²⁰ BVIHC(COM) 2018/0067 (delivered 23rd January 2020, unreported).

²¹ Ibid at para. 28.

the judge's discretion whether he or she requires an undertaking to be given before making the appointment.

Implying the cross-undertaking in damages in the Receivership Order

[46] The facts relating to the cross-undertaking in damages for the Freezing Order and the Receivership Order are set out in paragraphs 4, 5 and 6 above. Briefly, on 24th December 2017, JTrust obtained the Freezing Order which included a cross-undertaking in damages. The cross-undertaking was given in an affidavit of Mr. Shigeyoshi Asano in support of the application. Shortly after, on 4th January 2018, JTrust applied for the appointment of a receiver of APF. JTrust did not offer a cross-undertaking in damages and none was included in the order appointing the Receivers. The issue was simply not raised at the contested hearing for the appointment on 5th July 2018, nor at any other hearing concerning the Receivership Order, including a failed application to set aside the order and the appeal therefrom. There was no appeal from the non-inclusion of a cross-undertaking in the Receivership Order.

[47] Based on my finding that a cross-undertaking in damages is not required for every receivership order, and that it is in the judge's discretion whether to require such an undertaking based on all the circumstances of the case, I do not think it is correct to say that Adderley J erred in not requiring JTrust to offer a cross-undertaking in support of the Receivership Order. Different considerations would apply if the Respondents, through counsel, had asked the court to include a cross-undertaking in the Receivership Order, or, a fortiori, the court had asked JTrust to offer the undertaking and it was not given. In either situation the judge hearing the application would have been expected to refuse to make the order unless JTrust offered the undertaking. However, there was complete silence on the matter and Adderley J cannot be faulted for not considering the matter. Further, the learned judge should not be faulted for not dispensing with the need for a cross-undertaking when the issue was not raised before him.

[48] When the application to include the undertaking in the Receivership Order came on for hearing before Wallbank J in April 2021, he found that the Receivership Order operated as a form of injunction; that the Receivership Order was ancillary to the Freezing Order and the cross-undertaking in damages given by JTrust for the Freezing Order should be implied in the Receivership Order. The Receivership Order was applied for in January 2018 and granted six months later in July 2018. The application to include the cross-undertaking in the Receivership Order was heard and determined in April 2021, almost three years after the Receivership Order was made. The learned judge's order also means that a cross-undertaking that was offered in December 2017 in support of the application for the Freezing Order was implied in the Receivership Order that was not in existence when the offer was made and the cross-undertaking given. At the time there was not even an application for a receivership.

[49] With the utmost respect to the very experienced and able judge, I am having difficulty with his decision to imply the cross-undertaking in the Receivership Order having regard to the nature of a cross-undertaking and the circumstances of the Respondents' application as outlined in the preceding paragraphs. The authorities make it abundantly clear that an undertaking is a voluntary promise to the court and the court does not have jurisdiction to order a cross-undertaking or to vary the terms of an undertaking voluntarily given by a litigant – per Lord Wilson in **Birch v Birch**,²² a decision of the UK Supreme Court.

[50] The point was made even more forcefully in the House of Lords decision of **Hoffmann-la-Roche & Co AG and others v Secretary of State for Trade and Industry** where Lord Walton opined that –

“Such an undertaking cannot, of course, be imposed by the court upon any applicant for an injunction; he must offer it, or be willing to submit to it. Be his case never so strong, if he is unwilling to proffer such an undertaking then he will not, in general, obtain his injunction...
For, quite clearly, as I have already noted, the court can never force, and never attempt to force, anyone to give the usual cross-undertaking in

²² [2017] UKSC 53.

damages; that must be given voluntarily; all that the court does is to refuse (in general) to grant an interim injunction unless the undertaking is given.”²³

- [51] A cross-undertaking is a serious matter. It is a solemn promise given to the court and if the person giving the undertaking acts in breach of its terms he can be committed to prison for his contempt of court. This is not a case where an undertaking was given, either expressly or by implication, and was not included in the order inadvertently. In that situation the court can amend the order to include the cross undertaking.²⁴ This case is entirely different. A cross-undertaking was not given in support of the application for the Receivership Order.
- [52] Mr. Nader raised the point that the application for the appointment of the Receivers was supported by the evidence of Mr. Johime Lee of Harneys which referred to the affidavit of Mr. Asano filed in support of the Freezing Order in December 2017 which contained the offer to give “the usual cross-undertaking in damages”. The offer was not referred to or repeated in Mr. Lee’s evidence. Mr. Nader submitted that JTrust’s reliance on the Asano affidavit which contains the cross-undertaking was a sufficient offer of a cross-undertaking to be included in the Receivership Order and Wallbank J was correct to imply it in the Order.
- [53] Mr. Nobiru Adachi, a director of APF, in his Eighth Affirmation²⁵ opposing the February 2021 application to include the cross-undertaking in the Receivership Order stated that Mr. Lee’s evidence did not refer to the offer of the undertaking in Mr. Asano’s affidavit, and that APF did not offer and does not now consent to an extension of the December 2017 offer of a cross-undertaking. Further, JTrust does not offer a fresh undertaking for the Receivership Order.
- [54] There is merit in Mr. Nader’s submission, but having regard to the clear principles that an undertaking is a voluntary promise given by a litigant to the court, and that

²³ [1985] AC 295 at pages 303-304.

²⁴ Snell’s Equity 34th ed. paragraph 45-45.

²⁵ Record of Appeal pages 151 – 167.

the court does not have power to vary the terms of an undertaking or to order the applicant to give an undertaking, I do not accept the submission. The Receivership Order is a separate, stand-alone order, even though ancillary to the Freezing Order. Having regard to the evidence of Mr. Adachi that JTrust had not given an undertaking for the receivership and was not willing to give one, the absence of an undertaking in the Receivership Order with no challenge from the Respondents, and the delay of three years before asking the Court to impose one, I am satisfied that Wallbank J should have enquired of counsel at the hearing in April 2021 whether JTrust was offering a cross-undertaking in damages for the Receivership Order. If the answer was positive the cross-undertaking would be included in the Order. If, as I expect, it was negative, the judge would have to decide what to do. This takes me to the next issue in this appeal – the counter-notices of appeal by the Respondents and Showa and the disposal of this appeal.

The counter-notices

[55] The grounds in the counter-notices of the Respondents and Showa largely overlap and I will deal with them together using my own numbering and sequence for convenience only. The notices assert the following grounds for affirming or varying Wallbank J's decision:

- (i) The judge was correct in finding that the cross-undertaking in the Freezing Order should be implied in the Receivership Order.
- (ii) If the judge was not correct this Court should find that the cross-undertaking in the Freezing Order was expressly given for the Receivership Order and accepted by Adderley J.
- (iii) The Receivership Order was ancillary to the Freezing Order and as a matter of construction any loss caused by the Receivers' appointment would be covered by Freezing Order.
- (iv) If this Court sets aside Wallbank's order implying an undertaking into the Receivership Order it should require a fresh cross-undertaking

from Jtrust within a fixed period failing which the receivership would be set aside.

[56] The finding above that Wallbank J erred in implying the cross-undertaking in the Receivership Order effectively disposes of the first reason in the counter-notice.

[57] The second ground involves a finding of fact that the judge did not make. The Respondents and Showa submit that the cross-undertaking in the Freezing Order was also given by JTrust expressly for the Receivership Order and it was accepted by the Court and the parties. Therefore, it should now be extended to the Receivership Order. The problem with this ground and the submissions of counsel is that the judge did not make a finding on the issue and the cross-undertaking, if it was accepted by the Court and the parties, was not included in the Receivership Order. The non-inclusion was not questioned or challenged by the Respondents. It was first raised by Showa on 30th November 2020 during the hearing of the sanctions application, almost three years after it was allegedly offered and accepted. I would not make the finding that the cross-undertaking was offered and accepted.

[58] The third ground raises an interesting point of law on which the Court did not receive much assistance from counsel by way of decided cases. In any event, a ruling on this point is not necessary because of the proposed disposal of the appeal.

[59] The fourth ground of the counter appeal takes me to the proposed order for disposing of this appeal.

Disposal of the Appeal

[60] The essence of the fourth ground is that if this Court sets aside the order of the lower court it should require JTrust to offer a fresh cross-undertaking in damages to support the Receivership Order.

[61] I found above that the Court can, in the exercise of its discretion, require an applicant for a receivership order to offer a cross-undertaking in damages, and if the applicant does not proffer such an undertaking, the Court will not make the appointment. This is clear from the dicta cited above in the cases of **Hoffmann-la-Roche** and **National Australia Bank Ltd** that the court can, in the exercise of its discretion, refuse to make an appointment if the applicant does not offer a cross-undertaking in damages. Mr. Flynn QC did not dispute that the court has this power. The situation in this case is a little different. The receivership is in place and the issue is whether it should continue without a cross-undertaking. In my opinion the court has a similar power to invite JTrust to offer a cross-undertaking and it does, to make such order as it sees fit including setting aside the receivership.

[62] Having considered the evidence, the submissions of counsel and the law and practice in the Virgin Islands relating to cross-undertakings in damages in receiverships, I am satisfied that this is an appropriate case for the continued appointment of the Receivers to be supported by a cross-undertaking in damages. The main reasons for this are that 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. I would also order that the undertaking should take effect from the date of the appointment of the Receivers on 5th July 2018.

New Evidence

[63] During the hearing Mr. Nader attempted to present new material to the Court regarding the proceedings in Singapore. Mr. Flynn QC objected on the ground that the new material is fresh evidence and that there is no proper application before the Court for its admission. I agree and no order is necessary on Mr. Nader's request.

Costs

[64] JTrust was partially successful on the appeal by securing an order setting aside the judge's order implying the cross-undertaking in the Receivership Order. However, the counter-notice of the Respondent and Showa were successful in securing an order from the Court requiring JTrust to provide a written cross-undertaking, failing which the receivership would be discharged. In the circumstances, I would order the Respondents and Showa to pay 50% of JTrust's costs of the appeal and JTrust to pay 50% of the costs of the Respondents and Showa on the counter-notice of appeal.

[65] Similar considerations apply to the costs in the court below. The Respondents and Showa were successful on the application to include the cross-undertaking in the Receivership Order. That order has been set aside and replaced by an order requiring JTrust to provide a cross-undertaking failing which the receivership will be set aside. In the circumstances the Respondents and Showa enjoyed greater success on the application and I would award them 75% of their costs in the lower court.

Orders

[66] I would make the following Orders:

- (1) The appeal is allowed and the order of the learned judge dated 15th April 2021 is set aside.
- (2) The Appellant may file a written undertaking to comply with any order that the Court may make, if the Court later finds that the Receivership Order has since 5th July 2018 caused loss to any of the Respondents and/or Showa, and decides that the Respondents and/or Showa should be compensated for that loss. If the undertaking is not filed by 4 pm on Tuesday 17th May 2022 the following orders shall take effect automatically:
 - (a) The Receivers are discharged from office immediately and must resign forthwith as directors of the Second Respondent.

The Receivers must give the Respondents all reasonable assistance to reverse all changes caused by the Receivers to the directorships of the Second Respondent and its subsidiaries;

- (b) By 4 pm on Tuesday 24th May 2022 the Receivers must deliver up to the Second Respondent, by service on its legal practitioners, Forbes Hare including by such electronic means of service as Forbes Hare may permit for this purpose, all books and records of the Second Respondent obtained or created by the Receivers and/or their affiliates, agents, employees or legal representatives, in connection with the receivership;
 - (c) The Appellant must pay the Receivers' remuneration, costs and expenses with no recourse to the Second Respondent's assets, and paragraph 11 of the Receivership Order is varied accordingly. Within 14 days the Appellant must reimburse the Second Respondent for any sums recouped by the Appellant or the Receivers from the Second Respondent's assets pursuant to paragraph 11 of the Receivership Order or otherwise.
- (3) The Respondents and Showa shall pay 50% of JTrust's costs of the appeal and JTrust shall pay 50% of the costs of the Respondents and Showa on the counter notices of appeal. The Appellant shall pay 75% of the Respondents' and Showa's costs in the lower court. All costs to be assessed by a judge of the lower court unless agreed within 21 days of the date of this order.

[67] Finally, the Court apologises for the delay in the delivery of this judgment due mainly to the competing demands of the Court's work and acknowledges the assistance of counsel for their very helpful oral and written submissions.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar