

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2017/0226

BETWEEN:

[1] JTRUST ASIA PTE. LTD.

Claimant/Applicant/
Respondent

and

**[1] MITSUJI KONOSHITA
[2] A.P.F. GROUP CO., LTD**

Defendants

and

**NICHOLAS JAMES GRONOW and JOHN DAVID AYRES
(as Receivers of the Second Defendant)**

Respondents

and

SHOWA HOLDINGS CO., LTD

Applicant

Appearances:

Mr. Vernon Flynn, QC, with him Mr. Peter Ferrer, Ms. Lucy Hannett and Ms. Marcia McFarlane
for the Claimant

Mr. Adrian Francis, with him Ms. Olga Osadchaya for the Applicant Showa Holdings Co., Ltd

Mr. Iain Tucker, with him Ms. Yegâne Güley for the Receivers

2020: July 8;
September 30

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the judgment of the Court on an application by the Claimant ('the Claimant's Application') filed on 16th January 2020 for certain relief in respect of a receivership (the 'Receivership') and an application by Showa Holdings Co., Ltd ('Showa') to strike out the Claimant's application ('Showa's Application').

- [2] For the reasons given below, the Court holds that the Claimant's Application fails and Showa's Application succeeds.

Background

- [3] The Claimant ('JTrust Asia') commenced these proceedings in the Territory of the Virgin Islands ('BVI') on 21st December 2017. By way of an extremely basic summary, the Claimant claims an amount of approximately US\$95 million from the Defendants. The Claimant alleged that the Defendants had misappropriated this sum for the First Defendant's benefit, as well as for the Second Defendant's benefit as the First Defendant's nominee and conduit for the First Defendant's fraud.
- [4] For background purposes only, and without making any findings of fact, the Claimant is a company incorporated in Singapore. It invested monies on five occasions in a company called Group Lease Public Company Limited ('Group Lease') that is listed on the Thai stock exchange. The investments took place between March 2015 and September 2017. The Claimant alleges that on 16th October 2017 the Thailand Securities and Exchange Commission announced that it had filed a criminal complaint against the First Defendant, Mr. Mitsuji Konoshita ('Mr. Konoshita'), for committing fraud, misappropriating Group Lease's assets and falsifying Group Lease's accounting records. Mr. Konoshita was or is a director of Group Lease and was its Chief Executive Officer until 16th October 2017. The essence of the alleged fraud was that some 38% of Group Lease's consolidated profits derived ostensibly from interest on a number of purported loans. The total of the loans was about US\$95 million. Allegedly, Mr. Konoshita was the controller and ultimate beneficial owner of several of the borrowers, making the purported loans a circular fraud, a dishonest and abusive practice known as 'round-tripping'. The Claimant claimed that the purpose of the loans was to defraud investors in Group Lease, by procuring their investments by overstating and thus misrepresenting Group Lease's real income.
- [5] The Second Defendant ('APF') is a BVI company. It is allegedly a nominee of Mr. Konoshita, as well as a holding company through which he operates a number of investments. It also holds the controlling stake in Showa. In its Amended Statement of Claim filed in these proceedings, the Claimant accuses the Second Defendant of assisting in the misappropriation

of the Claimant's funds by receiving, concealing and/or laundering some or all of the funds in question.

- [6] The Claimant claimed that it had relied upon representations made by Mr. Konoshita as to the purportedly sound basis for investing in Group Lease, and also upon Group Lease's accounts, which the Claimant says were intentionally misstated by Mr. Konoshita. The Claimant seeks a declaration that the US\$95 million be held upon trust for the benefit of the Claimant, consequential relief, and various permutations of relief that would see the Defendants liable to pay the Claimant that amount of money. The Claimant asserted that the Defendants knew that the Claimant's money had been paid over as an investment in Group Lease and so the First and Second Defendants knowingly received them in breach of trust and/or they had obtained these monies by fraud. The Claimant thus asserts that it has a substantive claim before this Court against both the First and the Second Defendants. The Second Defendant is not presented as a non-cause action Defendant.
- [7] On 24th December 2017 the Claimant obtained a worldwide freezing injunction in support of its claim over the assets of both Defendants. After some variations the amount frozen was set at US\$45million. The injunction required the Defendants to provide details of all their assets by a deadline. The injunction was continued on 13th February 2018.
- [8] On 5th July 2018 the Claimant obtained a receivership order over the assets of APF. Mr. Nicholas Gronow and Mr. John Ayres were appointed as joint and several receivers ('the Receivers'), for the purpose of identifying, protecting, preserving and (if appropriate) recovering the assets of APF. The Receivers are professional insolvency practitioners. The grounds for the appointment of the Receivers were primarily that Mr. Konoshita had been in a state of continuous contempt of the asset disclosure orders contained in the freezing order, and that he had the means and capability to dissipate his assets and had demonstrated an inclination and capacity to do so. The Defendants applied to have the freezing and receivership orders set aside. Both were ultimately upheld by the Court of Appeal in a judgment dated 18th December 2018.
- [9] APF holds the majority of the shares in Showa. Historically it has done so directly as to almost 59% of the issued share capital. It has also done so indirectly, as to about 5%, through APF's wholly owned subsidiary Asukano Holdings Co. Ltd. ('Asukano'). By virtue of the Receivership

in respect of APF, the Receivers are entitled to exercise majority shareholder voting rights over Showa. Showa is not a party to these proceedings. It is a Japanese incorporated company listed on the Tokyo Stock Exchange. Its directors (but for the Receivership) are Japanese and based in Japan. Showa operates outside the BVI.

- [10] The Receivers' powers were materially stated in standard terms. They were expressed as being 'for the purpose of identifying, protecting, preserving and (if appropriate) recovering the assets of the Company [APF] and the value of such assets with immediate effect pending the resolution of the claim herein'. The Receivers' powers were conferred upon them by this Court. They are wide. They include doing 'all acts and things as they may in their absolute discretion think necessary for realizing any of the assets of the Company (including Showa Holdings Co., Ltd and/or Wedge Holdings Co., Ltd and/or Asukano Holdings Co., Ltd.)'. The Receivers have the benefit of legal advice both in Japan and in respect of BVI law.
- [11] In the exercise of their powers the Receivers changed the Board of Directors of APF.
- [12] On 24th June 2019, Mr. Nicholas Gronow was appointed as a Director of Showa, along with a Mr. Atushi Hosono.
- [13] From quite early in the Receivership, the Receivers considered that it would be sensible to remove from Showa's Board of Directors four individuals, including Mr. Konoshita and his brother Mr. Tatsuya Konoshita. The Receivers proffered a number of reasons for considering this to be appropriate, and for considering that these four gentlemen were not suitable to continue as directors. I need not elucidate or comment upon such reasons here. It suffices to say that this was, and continues to be, a cause of hostility towards the Receivers from those in positions of influence in relation to APF and Showa's corporate structure, and in particular those who comprise the majority of the Board of Directors of Showa (referred to here and by the parties more generally as 'the Majority Board'). It has also been the subject of legal proceedings in Japan as well as here. In this jurisdiction, this Court made an order on 5th March 2019 that the Receivers should not pursue certain legal proceedings then on foot in Japan and certain corporate steps pending substantive determination of an application by Showa dated 15th October 2018 which sought an order that the Receivers cease and desist from any interference in the business and management of Showa, including any steps seeking to alter the make-up of Showa's Board.

- [14] On or about 24th May 2019 Mr. Konoshita resigned as a Director of Showa. The other three individuals continued as Directors. There are four other directors, who are ostensibly independent. The Receivers had concerns that they were not truly, or sufficiently, independent, but their concerns were not sufficiently supported for the Receivers to conclude that they were unsuitable to remain as Directors.
- [15] At a hearing on 17th December 2019 the Court made an order (the 'December Hearing' and 'the December Order' respectively) permitting the Receivers to cause APF and Asukano to exercise their voting rights in Showa to remove the Directors of Showa (excepting Mr. Gronow and Mr. Hosono) if the Board did not take certain steps regarding the appointment of an independent third party review committee (the 'IRC') to review certain apparently 'significant accounting irregularities' that Mr. Gronow attests he identified. The December Order was made upon an application by the Receivers. It made detailed provision for the constitution and establishment of the IRC. The IRC was to be established in accordance with Japanese Federal Bar Association 'Guidelines for the third party committee in case of corporate scandal'. The IRC was to have an independent 'Chairperson' appointed by members of a body called the 'Committee for Rating Third Party Committee Reports' (the 'CRTPCR'). The December Order contained other provisions intended to secure the IRC's independence. The December Order provided that the IRC shall be instructed that time is of the essence for their investigation and that it should do its best to complete and report on its investigation within three months of it being constituted. The Order provided that Showa shall, and cause its subsidiaries, relevant current and former directors and employees, including Mr. Mitsuji Konoshita, fully to cooperate with the IRC investigation. The December Order finally provided simply for '[I]berty to apply'.
- [16] At the December Hearing all parties appeared through Counsel, including the Claimant.
- [17] Just under a month after the December Order, on 16th January 2020, the Claimant filed the Claimant's Application under a Certificate of Urgency. The first head of relief the Claimant sought was that Showa or the Receivers be directed to provide the Claimant with an update as to the status of the appointment of the IRC. The second was that the December Order be amended to direct Showa's Board of Directors and the Receivers that all communication with the Chairman of the IRC and/or with the CRTPCR be conducted by the Receivers only. The third was that the Receivers be directed to call an extraordinary general meeting of Showa to

remove all Showa's Directors, save for Mr. Gronow and Mr. Hosono. The Claimant also sought an order that Showa should pay the Claimant's costs of that application.

[18] The Claimant had foreshadowed this application in an email to Showa's and the Receivers' legal practitioners asking four questions by way of an update. That message was timed at 7.57 p.m. on 15th January 2020 and gave them until opening time in the BVI on 17th January 2020 to respond. Despite this, and without waiting for any reply, the Claimant filed its application on 16th January 2020 at 2.26 p.m.

[19] Showa's legal practitioners responded on 16th January 2020 at 5.56 p.m. They explained that its Board had resolved to appoint the IRC, the Board had met, discussed and agreed the scope of work and instructions for the IRC, the appointment of the Chairman was being progressed by Showa's independent directors in accordance with the terms of the December Order, it being for that Chairman to appoint the remainder of the IRC, and once the Chairman has done so, the investigation will progress. Showa's message also took points that the Claimant had no liberty to apply and has no standing to make its threatened application, and that the Claimant had not provided the two days to respond that their email had said they would.

[20] The grounds for the Claimant's Application, summarily stated, were that as time had been expressed to be of the essence, a month had already gone by with no news whether the IRC had been appointed and no news about what progress it had made; moreover, that the December Order did not prescribe who would provide the instructions to the IRC and the CRTPCR, so the December Order should be amended to make provision for that. The Claimant explained that it was concerned to ensure that the Board of Showa, the financial transactions of which the IRC was to investigate, would have no involvement in instructing the IRC or directing it in its investigations. That was a point the Court was alive to at the hearing of the Receivers' application, as the Claimant observed.

[21] On 17th February 2020 Showa filed its application seeking to strike out the Claimant's Application with costs. The grounds cited by Showa were that:

- (1) The Claimant lacks standing to make its application, or to restrain the actions of Showa or of the Receivers;
- (2) The Court has already ruled that the Claimant lacks standing; thus the application is an abuse and is not a matter the Court should adjudicate;

- (3) Showa is not subject to the jurisdiction of the Court and any order made against it will have no extra-territorial effect;
- (4) The Claimant has no entitlement to be updated on the actions or investigations of the Receivers, who are independent officers of the Court;
- (5) Showa did update the Claimant, on the evening of the same day on which the Claimant filed its Application;
- (6) Delay in appointing the IRC has not been caused by Showa, but by the Claimant and the Receivers; and
- (7) The Claimant's Application perversely seeks to stall any extant negotiations between Showa and the Receivers.

[22] Showa also had strident words concerning the Receivers. Showa filed an Affidavit in support of its application, provided by a BVI legal practitioner. It would appear that Showa's affiant, a legal practitioner admitted to practice in this jurisdiction, and/or those litigation lawyers who smithed this document, were only too content to adopt the *animus* against the Receivers which has manifestly been harboured by members of Showa's Board. The Claimant's Learned Counsel described the affiant's language delicately as 'intemperate'. A few examples will illustrate this and the thrust of their criticisms:

"The Receivers have been appointed over [APF] and have, since the first moment of their appointment, waged a myopic campaign designed to do no more than remove the entirety of Showa's board and to question (solely to the benefit of the Claimant) the transactions said to underlie the BVI proceedings... . The Receivers have done nothing else, and nothing of general value in terms of protecting [APF's] assets or value, since their appointment."

"[Mr. Gronow's] views, if expressed to the IRC, particularly through his active participation in its investigation, would undoubtedly affect the investigation and process, as they are not objective, open-minded, balanced or independent views. They are pre-formed."

"...the Receivers will pursue a single-track agenda to remove and replace the Board of Showa, irrespective of whether that is in the interests of [APF] and even in circumstances where applications lack standing, jurisdiction, effect or merit."

[23] Showa, through this affiant, also accuse the Receivers of inaccurately and incompletely updating the Court in a mischaracterizing manner, without proper context. They said that they intended to bring an application to remove and replace these Receivers. They also say that the Receivers have departed from an initial position of neutrality in respect of the Claimant's Application to supporting it.

- [24] The Claimant also says the Receivers support the Claimant's Application. The Receivers agree. They do.
- [25] The Receivers take issue with Showa's criticisms. For their part, they accuse Showa of inaccurate and misleading statements that are disingenuous, unhelpful, and seriously overstate the true position on various aspects. The Receivers bewail that they are 'once again put to the time and expense of having to deal with and respond to unnecessary conjecture which, unfortunately, has been a constant feature of Showa's evidence and correspondence'.
- [26] The Receivers caused Mr. Gronow to produce a 19th Affidavit on 6th July 2020 with the purpose of updating the Court in relation to steps taken to appoint the IRC. As at that date the IRC had not yet been appointed. At the time of writing, I do not know whether it now has, but it had not when the applications came on for hearing.
- [27] The picture painted by Mr. Gronow is that there was a meeting on 12th February 2020 with a representative of the CRTPCR, surrounded and followed by considerable correspondence and exchanges. Without here going into the details, there was conflict between Mr. Gronow and the Majority Board over such matters as who should be permitted to liaise with the IRC. The Majority Board wanted a certain gentleman to have sole responsibility for that, although that gentleman had been the one who had filed evidence on behalf of Showa 'vehemently opposing' the appointment of the IRC and seeking to justify the reporting and accounting of the transactions which the IRC had been appointed to investigate. That difficulty was ultimately resolved through agreement that Mr. Gronow could also attend a meeting with the CRTPCR. Mr. Gronow refers to Showa as adopting an obstructive position.
- [28] On 8th July 2020 Mr. Gronow produced a 20th Affidavit (still unsworn at the time/date of the hearing). In this, Mr. Gronow set out to refute a contention made by Showa that his neutrality concerning the outcome of the Claimant's Application meant that the Receivers were content with the progress made with the establishment of the IRC. Mr. Gronow explained that that was not the case. He stated:
- "The Receivers are and remain of the view that the IRC needs to be formed as soon as possible and I need to be involved in the formation in order to ensure its independence and to make sure that all of my concerns regarding the Transactions are properly considered by the members of the IRC. ... the Receivers support the Claimant's IRC

Application to the extent that it is in furtherance of the urgent need to appoint the IRC as soon as possible.”

[29] Mr. Gronow referred to an earlier statement he had made to the same effect in a 17th Affidavit that he had produced.

[30] Mr. Gronow stated that in his view ‘the Majority Board could be and should be doing a lot more to progress the formation of the IRC’. He explained further:

“...the fact that decisions regarding the IRC are only made at Board meetings has also meant that little or no progress is made in the interim. My recent experience is that matters regarding the IRC only ever seem to be progressed at my instigation with the Majority Board appearing to be content with the lack of progress made. Whilst the Majority Board wishes to ensure that all decisions regarding the establishment of the IRC are made by the Majority Board and that the Majority Board remains in control of the process this, in effect, means that my hands are tied in moving things forward.”

[31] Nonetheless, and irrespective of this explanation, it is a somewhat unusual feature of this case, as at the date of the hearing, that the Receivers had not themselves applied for directions, but appear to have been content to let the Claimant make the running in this regard. Whatever may have been their thinking in this respect, it is clear to me that the Receivers have not been motivated to sack the Majority Board, as Showa shrilly accuses them of, otherwise they would, and certainly could, have done so long ago.

[32] Showa’s affidavit evidence also complains trenchantly about the Claimant. Its affiant states that the Claimant has issued

“no less than four(1) (Notices of Application dated 25 April 2019, 16 June 2019, 16 January 2020 and 10 February 2020, respectively) substantive applications...since the receivership order. The Claimant has sought to intervene in every single hearing that has taken place in relation to the conduct of the receivership, and has doggedly sought disclosure of materials that are confidential to Showa’s Board of Directors, which it can be inferred it is only seeking to do for its own benefit in the conduct of the underlying litigation.”

The Parties’ Contentions

Standing to apply

[33] Showa submits that the Claimant lacks standing to make its application, or to restrain the actions of Showa or of the Receivers. Showa argues that the Claimant has no standing to be heard in relation to the conduct of the Receivership. Showa acknowledges that, as an

exception to this, the Claimant would have standing to argue that the Receivers are not properly performing their duties and ought to be removed and/or replaced. Showa argues that the Claimant has no right to interfere in any bilateral applications or matters between the Receivers and Showa, and they have no right to be updated, especially where the Receivers themselves do not feel the need to apply for any relief against Showa.

- [34] The Claimant disagrees. It asserts that it has standing to make its application because it has a sufficient interest to make it, since it is the Claimant in this case and the (alleged) victim of the Defendants' fraud. The Claimant contends that it has an interest to ensure the protection of APF's major asset (shares in Showa) and the investigation of its suspected misconduct. In this regard, the Claimant relies upon *dicta* of Lord Millett in the Privy Council case of **Deloitte & Touche AG v Johnson**¹ that

“Where the Court is asked to exercise...its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it.”

- [35] The Claimant further submits that the Court has already determined that the Claimant has sufficient interest, because the Claimant was permitted to make submissions at the hearing when the IRC Order was made and the Claimant was given liberty to apply.
- [36] Showa disputes this. It accepts that the Claimant had been allowed to participate at the hearing, but on a limited basis, and there was nothing expressed in the liberty to apply to show that it was intended to extend to the Claimant. Showa says the Claimant attended the hearing as little more than an observer, to whom liberty to apply would not in principle apply. The Claimant, however, observes that it had been allowed to make submissions at the December hearing, so cannot be treated as merely an observer, but should be treated as a party with sufficient interest, to whom the liberty to apply also extended.
- [37] Showa contends further that this Court, by Justice Adderley, has already ruled on 20th June 2019 that the Claimant has no standing to have made an application against Showa. Showa relies upon this to argue that that ruling establishes an issue estoppel or *res judicata* which this Court must follow.

¹ [1999] 1WLR 1605 at 1611 B – C (Millett LJ).

[38] The context of that ruling by Justice Adderley was that the Claimant had applied to the Court for, in effect, a declaration that APF and its subsidiary Asukano could exercise their voting rights as registered shareholders of Showa at a forthcoming annual general meeting. The Claimant said it was making that application to assist the Receivership, in circumstances where the Claimant understood that Showa was taking a position that APF's and Asukano's shares should not be admitted for the purposes of voting. The Claimant said that it had issued that application on the basis that it, as the Claimant, was the party who had appointed the Receiver and that it was concerned that the assets of APF were or could be at risk. The Claimant explained that it was concerned that the powers of the Receivers were being hampered and the Court is empowered, as the supervising court, to make an order supporting and upholding its own order. The order then sought by the Claimant would give it 'comfort', argued the Claimant.

[39] Both the Receivers and Showa on that occasion submitted that the Claimant's understanding of the position in relation to voting was incorrect. There was no issue that APF and Asukano, as shareholders, could vote. The issue between the Receivers and Showa concerned the procedural methodology as to how the votes would in practice be cast. That issue, Receivers' learned Queen's Counsel was at some pains to stress, was the subject of *bona fide* discussions on both sides and an agreed resolution was imminent. Showa's learned Counsel submitted that the Claimant's application was unnecessary, the relief sought there was unnecessary, and that

"the Court should not encourage this kind of interfering behaviour from a party in the action that its receiver, who is a professional, professionally advised, has leading Counsel, is not itself concerned with this problem and has not itself sought this assistance either of the Claimant or the Court."

[40] Justice Adderley then dismissed the Claimant's application on two grounds, the first being that the Claimant lacked standing to make its application. Justice Adderley did not give reasons for that conclusion but must be taken to have accepted Showa's submission I have quoted above and to have rejected the Claimant's submissions on standing. Neither learned Counsel for Showa nor Justice Adderley cited any authority in support of it. The Claimant's learned Counsel did not refer to any authority either.

[41] The Claimant says that no issue estoppel or *res judicata* arises. It submits that Showa's submission in this regard is devoid of any analysis as to how Justice Adderley's ruling satisfies the criteria for issue estoppel or *res judicata*. Moreover, that ruling was interlocutory, not final,

limited to the issues before the Court on that occasion and did not (and could not) purport to exclude the Claimant for all time from making submissions or applications in relation to the Receivership.

[42] Showa further argues that the Receivers, as officers of the Court, are not agents of the Claimant by virtue of being their appointer, and do not act for the Claimant's benefit; the Receivers' function is to 'hold the ring'² pending the determination of the proceedings. Neither should the Claimant be permitted to step in every time it disagrees with the Receivers' conduct or lack of action in circumstances when the Claimant believes action is required. The Receivers have powers defined by the order appointing them; should they act in any way contrary to those powers, the Claimant has the right to apply to replace them. Other than this, the Receivers should be left to conduct the Receivership in accordance with the Receivership order and their powers thereunder.

[43] The Claimant responded to this by arguing that it had a sufficient interest in the application to do so. The Claimant accepts that its application appears to be unusual, but in this case, the Receivers support the Claimant's Application and they prefer the Claimant to make it rather than the Receivers themselves. Showa criticizes this position, on the basis that Receivers have a duty to act impartially³ and are breaching this duty by aligning themselves with the Claimant.

Jurisdiction over Showa

[44] Showa argues that it is not subject to the jurisdiction of the Court, having no real connection to the BVI, and any order made against it will have no extra-territorial effect. Showa says that all steps taken by it in these proceedings have been so taken without prejudice to its position on jurisdiction.

[45] The Claimant disputes this. The Claimant submits that by its participation in these proceedings it has submitted to the jurisdiction of the Court and cannot now contend that the Court does not

² Capewell v Revenue and Customs Commissioners [2007] 1 WLR 386 at paragraphs 19 -20 (Walker LJ).

³ Capewell v Revenue and Customs Commissioners [2007] 1 WLR 386 at paragraphs 19 -20 (Walker LJ); Milsom & Ors. v Ablyazov [2011] EWHC 955 (Ch.) at paragraph [38] (Briggs J).

have jurisdiction over it. The Claimant cites Rule 14-069 of Dicey & Morris, The Conflict of Laws, 15th ed (2012) which states:

“This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a court by appearing before it cannot afterwards dispute its jurisdiction. Where such a litigant, though a defendant rather than a claimant, appears and pleads to the merits without contesting the jurisdiction there is clearly a voluntary submission.”

- [46] To support its contention, the Claimant says that on a number of occasions in these proceedings Showa has complied with orders and directions of this Court and given undertakings to comply with the Court's orders.

Entitlement to receive updates

- [47] Showa argues that the Claimant has no entitlement to be updated on the actions or investigations of the Receivers, who are independent officers of the Court.
- [48] The Claimant urges that it does have such an entitlement as the party who applied to have the Receivers appointed and who is interested in the location and preservation of the Defendants' assets.

The update provided by Showa

- [49] Showa submitted that it did update the Claimant, on the evening of the same day on which the Claimant filed its Application. The application for an update was therefore unnecessary, should not have been made, nor persisted with. Showa also pointed out that the Claimant's legal practitioners had not abided by their own time period within which they had requested an update.
- [50] The Claimant's learned Queen's Counsel (rightly) did not seek to defend the Claimant in respect of the last criticism. He submitted however that the update Showa had provided was so terse and general that it was not of any real use. Subsequently the Claimant's legal practitioners have pointed out to the Court that although they had filed the application before the deadline they had set had expired, they did not serve it until after it had expired.

Delay in constituting the IRC

- [51] Both Showa and the Receivers accuse each other as the party at fault in the delay for the establishment of the IRC. Showa says the Claimant and the Receivers are both at fault – the Claimant through its interference, thus they are in no position to make an application to speed up the process as if Showa were the cause. Showa argues further that the effect of the Claimant's relief sought would be to bring to an end fruitful negotiations that have been on foot between the Receivers and Showa's Board and that would add to the delay. The Receivers say that they were not the cause of delay and give quite detailed affidavit evidence of what was done and why. They accuse the Majority Board of Showa of being the authors of the delay. The Claimant, for its part, also points its finger at Showa. The Claimant challenges the good faith of the Majority Board's apparent strategy of progressing matters only at monthly Board meetings, which had the effect of causing each ponderous step slowly, deliberately slowly, to be followed, after a considerable lapse of time and argument over a multitude of issues, by the next ponderous step, with the obvious intention of trying to avoid that the destination of establishing the IRC is ever reached.

Discussion

- [52] It is easy to understand that a claimant who has, often at considerable cost to himself, applied for a receiver to be appointed, should consider that he should have some visibility over the work done by the receiver and that he should be allowed to provide input into the receiver's investigatory work to improve it. However, from the moment of his appointment by the Court, the receiver answers to the Court as he is an officer of the Court. In principle, by virtue of the receiver's position as an officer of the Court, he has no inherent duty to a claimant or any other party to the proceedings. Nor does the Court have a duty to ensure the claimant or any other party is updated. In a strict sense therefore, a claimant or another party to the proceedings has no legal entitlement either to receive updates or to make applications to support a receivership. In practice, though, circumstances may be such that the Court should sensibly hear what someone outside a receivership has to say. Often it is the claimant or another party to the proceedings who has the more intimate knowledge of the defendant's circumstances and affairs, and it is often helpful for the claimant or such other party to have some opportunity, controlled by the Court, to see what is happening within the receivership so that he can if appropriate contribute to render it more effective. It can also be reasonable to afford such

visibility to a claimant where he is providing funding for the Receivership, for the basic reason that the claimant might no longer be able or wish to pay for the Receivers' work. The usual way in which this balance between the receiver and the claimant is struck is for the Court to direct the receiver to report to the Court periodically, with a copy of the report to be shared with the claimant, perhaps with sensitive information being redacted. This entails a fine balance being maintained between the interests and wishes of the claimant or other parties, and the receiver's independence. Sometimes claimants do not grasp the nuances and balances involved, and do not understand, or do not want to understand, that the appointment by the Court of an office holder upon the application of a party who has paid for the privilege is not a standard business transaction where you pay your money and get a service in return, and the 'customer is king'.

[53] This begs the question what legal test applies for the Court to determine whether a claimant, or any other party for that matter, should be heard to make an application in relation to a receivership. Showa accepts that there are certain types of application the Claimant here could make – essentially limited to the Claimant's interest in a continuation or termination of the Receivership, or the identity of the Receiver(s). Showa does this without reference to authority, and it is not clear what foundational criteria Showa relies upon to say that the Claimant should be allowed to make those types of application, but not others. The Claimant on the other hand says that the issue of its standing to make an application in relation to a Receivership comes down to whether the Claimant has a 'sufficient interest' to make it, applying **Deloitte & Touche AG v Johnson**.⁴ Showa does not say this is incorrect. The Claimant however interprets a 'sufficient interest' as being satisfied by an overarching general interest in the location and preservation of the Defendants' assets for eventual enforcement.

[54] It is not obvious what is meant, in the present context, by a 'sufficient interest'. Clearly the Claimant has *an* interest. It did after all satisfy the Court that it had a good arguable case and that the other requirements for the Receivership had been met. But does such a general interest clothe the Claimant with sufficient interest to make this particular application? How does the Court measure sufficiency?

[55] **Deloitte & Touche AG v Johnson** is instructive. Lord Millett there enunciated general principles that apply to many types of application brought in respect of office holders appointed

⁴ [1999] 1WLR 1605 at 1611 B – C (Millett LJ).

by the Court. It is an authority binding upon this Court. Whilst that case concerned an application by a defendant to proceedings to remove a liquidator on grounds of alleged conflict of interest, the general principles expressed there apply also to receiverships.

- [56] Lord Millett explained that when considering whether an applicant has standing, the Court must first ask itself whether the power it is asked to exercise has been conferred on it by statute. If so, the Court must examine the statute to see if it identifies the category of persons who may make the application.⁵ Here, the powers sought to be invoked by the Claimant derive either from section 24(1) of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**,⁶ ('the **Supreme Court Act**') or the Court's inherent jurisdiction. Section 24(1) provides:

"...an injunction may be granted by an interlocutory order of the High Court or of a judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms as the court or judge thinks just."

The Supreme Court Act does not identify the category of persons who can apply for relief under this section. The Court's inherent jurisdiction is equally open ended. Consequently, the Claimant does not fall in a category of persons *disqualified* by statute from making an application.

- [57] The second consideration that must be borne in mind is that

"[w]here the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. ... It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction."⁷

- [58] Lord Millett explained that a 'proper person' is not someone who merely has an interest in making the application or may be affected by the outcome. A proper person is someone who has a 'legitimate interest *in the relief sought*' (emphasis in the original).⁸ In that case, the Privy Council ruled that only persons entitled to participate in the ultimate distribution of the assets of a company in liquidation had a legitimate interest in the removal of liquidators, which was the

⁵ [1999] 1WLR 1605 at 1611 C - D (Millett LJ).

⁶ Cap 80, Revised Laws of the Virgin Islands 1991.

⁷ [1999] 1WLR 1605 at 1611 A - C (Millett LJ).

⁸ [1999] 1WLR 1605 at 1611 E (Millett LJ).

relief sought there. Thus, on the facts of that case, the defendant to the claim who sought the liquidators' removal for litigation purposes had no 'legitimate interest' in doing so.

[59] In the present case there are three substantive heads of relief the Claimant seeks.

[60] The first head seeks an order that Showa or the Receivers be directed to provide the Claimant with an update as to the status of the appointment of the IRC. Showa appear to have been content, or at least, not overly unhappy, about providing the Claimant with an update of sorts when asked. It is common practice, for practical reasons, for claimants to be accorded some form of update on the progress of a receivership, as I have mentioned above. A claimant who was the applicant for the appointment of a receiver might be in a position to provide important information or insights into the circumstances of a case that receivers might otherwise not be aware of or properly appreciate. Such a claimant has a legitimate interest in being provided with updates so that he can proffer his knowledge if the Court considers appropriate and the Court ought generally to treat him as a proper person to apply for updates to be given. Whilst I accept that the Claimant has standing to apply for the relief under this head, it is quite another matter whether, in the Court's discretion, the particular relief here ought to be granted. I will turn briefly to this now, and then return to the question of standing in relation to the other heads of relief sought.

[61] As a matter of discretion, it is not appropriate in my respectful view to grant the relief sought under this head. First, Showa did provide an update. It was very short, but it gave the headline points. That the Claimant might not have found it useful for its own purposes, does not render the update any less of an update. In a sense, that head of relief is otiose, and no order in respect thereof is, or was ever, necessary. This of itself warrants denial of this prayer for relief.

[62] Separately and additionally, it is to be deprecated that the Claimant's legal practitioner set a deadline for a reply to its request for an update, and then to have filed the application for an update to be ordered without waiting for a reply. Their opponent had been given a legitimate expectation that it had a certain time within which to provide a response, only to find later upon service of the application that the Claimant had already engaged the Court's process regardless of (a) the deadline given and (b) the tenor of Showa's response. That is an inherently unfair approach. A more just and creditworthy approach would have been for the Claimant's legal practitioners to file their application for other relief, if they felt the need to do so

at that point, and then to amend their application to include new relief if Showa did not respond properly or at all within the deadline they had set. This is a factor which weighs against an exercise of discretion in favour of the Claimant, although I do weigh in the balance that the Court does not have evidence before it whether or not the Claimant itself was aware of this approach.

[63] The second head of relief sought was that the December Order be amended to direct Showa's Board of Directors and the Receivers that all communication with the Chairman of the IRC and/or with the CRTPCR be conducted by the Receivers only. I am not persuaded that the Claimant is a proper person to have sought this relief. The establishment of the IRC is part of the processes pertaining to the Receivers' investigations. It is the Receivers who have a legitimate interest in ensuring that this part of their processes is not perverted by undue influence from the Majority Board. The Claimant is clearly someone who is potentially affected by the outcome of the Receivers' investigations, but the Privy Council in **Deloitte & Touche AG v Johnson** held that such a general interest was not enough.⁹ It is difficult to see what interest the Claimant, as opposed to the Receivers, have in this specific relief. The Claimant itself does not need such an order, because it is not a joint receiver with the Receivers. The Claimant does not show that an order of the type sought is reasonably necessary. Indeed the Claimant cannot know this because it is not involved in the day to day conduct of the Receivership. The Claimant is relatively uninformed, compared to the Receivers. As a matter of judicial restraint, the Court ought not to hear the Claimant.

[64] That said, I accept that it is not obvious where the line ought to be drawn in this case between when a party such as the Claimant has a legitimate interest in relief and when it does not. Even if, contrary to what I have found, the Court were to accept that the Claimant does, then discretionary considerations still in my respectful judgment weigh against granting the Claimant this relief. It is a factor of very considerable weight that there are in place two professional Receivers, who are professionally advised both as to Japanese law and BVI law, and amply capable of applying for directions if they should think this relief reasonably necessary. The Claimant does not suggest that the Receivers are in any way falling short in respect of the performance of their duties. There is no evidence before me to indicate that the Receivers need the Claimant's help to seek this relief. Neither the Claimant nor the Court is qualified to

⁹ [1999] 1WLR 1605 at 1611 E (Millet LJ).

know better than the Receivers whether this relief is necessary or appropriate. In short, the Claimant's Application is unnecessary. That is sufficient reason for the Court to dismiss it.

[65] The third head of relief sought is that the Receivers be directed to call an extraordinary general meeting of Showa to remove all Showa's Directors, save for Mr. Gronow and Mr. Hosono. The same reasons apply to this head as they do for the second head.

[66] For these reasons I consider I ought to dismiss the application. I will, though, add the following for completeness.

[67] I am not persuaded that the fact the Claimant was permitted to make submissions at the December Hearing means that the Court accepted that the Claimant continued to have a legitimate interest in the processes leading up to establishment of the IRC and its methodology, so as to vest the Claimant with standing to make applications concerning them whenever it wanted to. The Court needs to look at an applicant's standing with regard to each application to ensure he has standing to make that particular application on its own terms.

[68] I am not persuaded that Justice Adderley's finding in respect of the Claimant's previous application that the Claimant lacked standing gave rise to an issue estoppel or *res judicata*. It was a ruling on an interlocutory application, for which Justice Adderley gave no direct reasons, in a brief *ex tempore* judgment. Indeed, closely analyzed, when Justice Adderley ruled that the Claimant had no standing to make that application, the reasons given by Counsel for both sides for and against allowing the Claimant to interfere did not necessarily go to the issue of standing, although expressed as such. They can also be understood as having addressed discretionary considerations whether a party such as the Claimant should be permitted, for policy reasons, to interfere by making an application that receivers could make. No significant argument appears to have been made on that occasion as to the requirements an applicant needs to show to establish standing. Moreover, the relief sought in that earlier application by the Claimant was different to the heads before the Court now. This is not a clear case of issue estoppel or *res judicata* arising and I will not treat this argument as in any way determinative.

[69] Similarly, I am not persuaded that Showa has submitted to the jurisdiction of this Court. The question calls for more investigation and evidence (e.g. as to the times, if any, and the terms, in which Showa might have reserved its position as to jurisdiction) and quite possibly more

authority before I could make a determination on this question. I am rather inclined to think that Showa has not submitted to this jurisdiction, in that it is not party to any claim here and it has not pleaded to any merits in any claim here. It has come to this Court only to protect itself in respect of points that might affect it through the medium of the Receivership. Showa is not subject to the territorial or personal jurisdiction of the Court as of right, and the Court does not have subject matter jurisdiction over it. Consequently, I am not satisfied that this Court has any jurisdiction to order Showa to do anything substantive. The Court can of course direct and/or order Showa to do things in the procedural sphere: by taking part in proceedings before this Court Showa must be taken to have subjected itself to the case management powers of this Court in respect of these proceedings and to ancillary jurisdictions, such as in respect of costs orders. But I do not think that this Court can give orders to Showa in respect of how its corporate or internal affairs are to be conducted.

- [70] In respect of Showa's argument that the general liberty to apply did not apply to the Claimant, I do not accept this argument. The Claimant is a party to these proceedings. It appeared and made submissions at the December Hearing. Even Showa accepts that the Claimant had standing to bring certain types of application. For Showa to try to construe the general, unqualified, liberty to apply as somehow excluding the Claimant for certain types of claim but not others, is artificial and finds no favour with me. Every order inherently bears within itself liberty to apply, even if it is silent on the point.¹⁰

Disposition

- [71] In these circumstances, I respectfully believe the correct decision is to dismiss the Claimant's Application. It is nothing to the point that the Receivers supported the Claimant's Application. Support is insufficient to take over conduct of it, and the Receivers were content not to do so. The net result is simply that the Receivers do not get the benefit of any of the relief that the Claimant had applied for. This does not preclude the Receivers making their own application for directions, even for the same heads of relief.
- [72] Costs should follow the event in the usual way. What this means in terms of specific costs provisions in this case I will leave to further submissions. Without prejudice to this, I will be

¹⁰ *Fritz v Hobson* (1880) 14 Ch D 542 at 561 (Fry J).

frank and say that I am inclined to find that the Claimant ought to pay Showa's costs of the Claimant's Application, which was unsuccessful, and of Showa's strike-out application, which was successful. I am further inclined to find that the Claimant should pay the Receivers' costs of those applications. Not only did the Claimant put the Receivers to the trouble and expense of addressing them, but it would be wrong in my provisional and respectful view to burden APF with the Receivers' costs, if they would be met from the assets of the Receivership estate. There is, again in my provisional view, no reason to require the Receivers to bear their own costs, nor for them to pay Showa's costs personally, merely because the Receivers supported the Claimant's Application – this matter was driven by the Claimant and it was misconceived, thus the Claimant should in principle be required to bear the costs consequences. The Court will hear the parties on appropriate directions so that this aspect can proceed to a determination.

[73] I take this opportunity to thank learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar