Causation, mitigation and remoteness: cross-undertakings and the Court of Appeal

On 10 November 2017, under "Pricing the Promise", by reference to the *Fiona Trust* decision we reviewed how the courts will assess a claim on the cross-undertaking in a Freezing Order.

We also outlined the appeal, whose 21 November 2017 decision (SCF Tankers Ltd & Ors v Privalov & Ors [2017] EWCA Civ 1877 (21 November 2017)) suggests that a Claimant will usually find it very hard to argue on causation, mitigation and remoteness, and illustrates the courts' approach on these issues.

Very briefly

1. A Freezing Order usually allows matters "in the ordinary and proper course of business"; however,

2. here a crucial variation said that what proved to be the core of the Defendant's claim on the cross-undertaking - trading in newbuilds - was not in the ordinary and proper course of his business; and

3. most of the money was frozen on those terms.

Mr Justice Males

The Claimant said that:

(i) this wording would not have barred the Defendant in any relevant way;

Males J disagreed, holding that causation was established. The claimed activity was plainly within the ordinary course of the Defendant's business - see for example his attempt to remove the fetter, and some of the interlocutory evidence - and the claimed losses were not too remote;

(ii) failure further to challenge it was failure to mitigate - this did not succeed, as mitigation requires only reasonable steps.

The Defendant had tried to remove the key restriction and it would not have been reasonable for him to apply again. Such would have been vigorously resisted and might well have failed. The court must take a realistic approach to these things.

The Court of Appeal

The Claimant attacked on causation and mitigation. Having first argued on the actual scope and interpretation of the relevant order, he urged that:

(a) the Defendant should have applied further to vary it and would probably have succeeded; and

(b) a Defendant had to show prospective failure with any such application, rather than a Claimant prospective success.

Decision

The Court of Appeal held that:

i. the relevant restriction did prevent the Defendant from purchasing newbuilds, as claimed. It caused loss that was not too remote, and no further challenge was not failure to mitigate and did not break the chain of causation;

ii. the courts must indeed take a common sense approach. A Defendant does not have to show that another application to vary an order would have failed; on the contrary

iii. it is enough for him to make a *prima facie* case of the difficulties that any such application would have faced; and

iv. once the Defendant establishes a *prima facie* case that the damage was caused by the order, if there is nothing to displace that the court can infer that the damage would not have been incurred but for the order.

Commentary

This shows that, in defending a claim on a cross-undertaking, it will be hard for a Claimant to say that the Defendant could and should have altered the relevant terms, such that there would have been no claim.

It therefore reinforces the points we made on 10 November. In essence:

(i) a cross-undertaking in damages is a serious obligation, and a Defendant who later claims on it will probably be given considerable leeway as regards analysis of his evidence;

(ii) a Claimant could thus be at a considerable disadvantage, and should expect further difficulty in arguing that the Defendant should have challenged the order further, or otherwise in raising causation, mitigation and remoteness as defences.

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