

Feature

KEY POINTS

- In order for an anti-suit injunction to be granted in the English Courts in the absence of an exclusive jurisdiction clause or an arbitration clause, it will ordinarily be necessary:
 - for the foreign defendant to have submitted to the English proceedings; and that
 - he has sought vexatiously to extricate himself from that submission; or
 - he has sought oppressively to prolong or multiply the litigation by commencing further proceedings abroad.

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Anti-suit injunctions and a touch of egoistic paternalism

THE FACTS

The dispute arose in relation to two charterparties (the Charters) between Star Reefers Pool Inc (Star Reefers), a Cayman Islands company, and Kalistad Limited (Kalistad), a Cypriot company. Kalistad was a nominee company of JFC Group Co Ltd (JFC), a Russian company. The Charters contained jurisdiction clauses in favour of London arbitration and provided that JFC would guarantee the obligations of Kalistad.

When Kalistad defaulted on the hire payments due under the Charters, Star Reefers commenced arbitration proceedings against both Kalistad and JFC. JFC disputed that it was a party to the Charters on the basis that it had not signed them.

In response Star Reefers sought to rely upon two letters in which JFC certified that it would guarantee the performance of its nominee, Kalistad, under the Charters (the Letters of Guarantee).

JFC then commenced proceedings in the Russian courts seeking a negative declaration to the effect that the Letters of Guarantee were not effective since they constituted offers which had not been accepted by Star Reefers and that under Russian law it was necessary for the offers of guarantee to be accepted in order for them to be effective. JFC sought to rely on Russian law on the basis that, as a matter of Russian private international law, the law applicable to the international transactions of a Russian party is the law of Russia.

Subsequently, Star Reefers issued proceedings against JFC in the English commercial court and obtained an anti-suit injunction against JFC which required it to not take any further steps in the Russian proceedings. The anti-suit injunction was upheld by Mr Justice Teare following an *inter partes* hearing.

JFC applied to challenge the jurisdiction of the English courts but the application

Oliver Cain considers the recent decision of the Court of Appeal in *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14 and its impact on the law in relation to anti-suit injunctions where there is no valid or applicable jurisdiction or arbitration clause.

was dismissed on the basis that Star Reefers had a good arguable case that the Letters of Guarantee were governed by English law. Star Reefers then obtained summary judgment by way of an unopposed application.

BACKGROUND TO ANTI-SUIT INJUNCTIONS

In cases where the relevant agreement contains an exclusive jurisdiction clause or an agreement for arbitration in England,

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the English courts would ordinarily give effect to that agreement by granting an anti-suit injunction in the absence of a strong reason not to do so.

However, in this case there was no valid jurisdiction or arbitration clause. As a result it was necessary for two conditions to be satisfied before an anti-suit injunction could be obtained in the English courts. These were:

- England should be the natural forum for the resolution of the dispute; and
- the conduct of the party to be enjoined has to be vexatious, oppressive or unconscionable.

If both of these conditions are satisfied, the court will then proceed to exercise its discretion as to whether or not an anti-suit injunction should be granted. The court should have regard to the interests of comity,

namely the principle that the courts of one country should give effect to the laws of another country and the judgments given by the courts of that country.

The cases in this area tend to use the words "vexatious" and "unconscionable" interchangeably.

It is important to note that the position is different where the foreign proceedings are brought in an EU member state, since the grant of an anti-suit injunction is incompatible with the Brussels Regulation

which governs the jurisdiction of the courts in those countries.

THE DECISION OF TEARE J

At first instance, Teare J proceeded on the basis that the Letters of Guarantee were governed by English law pursuant to Art 3 of the Rome Convention and that England was the natural forum for the resolution of the parties' disputes. As a result, the crucial question was whether or not JFC had acted unconscionably in issuing proceedings in Russia.

Teare J held that JFC's conduct was vexatious with the result that the anti-suit injunction restraining it from taking further steps in the Russian proceedings was properly granted. The first major reason relied upon by him was that the Russian proceedings were commenced with a view to frustrating the determination of the dispute in England.

The second major reason was the apparent weakness of JFC's case under Russian law.

JFC sought and was granted permission to appeal to the Court of Appeal.

THE DECISION OF THE COURT OF APPEAL

The judgment of the Court of Appeal was given by Lord Justice Rix. The Court of Appeal overturned the decision of Teare J.

Rix LJ analysed the position in relation to unconscionable conduct. It cannot be defined exhaustively but includes conduct which is "oppressive or vexatious or which interferes with the due process of the court"

"A significant advantage can be obtained by acting quickly to commence proceedings in a jurisdiction in which a party believes it has the greatest advantage."

(see *The South Carolina case* [1987] AC 24 at 41, per Lord Brandon of Oakbrook). Furthermore, to reflect the interests of comity and in recognition of the possibility that an injunction may be regarded as an interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in English proceedings and so there must be a clear need to protect the existing English proceedings (see *Turner v Grovitt* [2002] 1 WLR 107 at paras 27 to 28).

While Rix LJ accepted Star Reefers' argument that submission to the English court was not a condition precedent to the jurisdiction to grant an anti-suit injunction, he expressed the view that where a foreign defendant against whom proceedings are brought in England has not agreed to litigate or arbitrate in England and has not submitted to the English proceedings, it is difficult to envisage how his foreign proceedings will impede the English proceedings or why an anti-suit injunction will be necessary to protect the English claimant's legitimate interest in his English action. He noted that ordinarily the actions of a foreign claimant will be unconscionable where he has first submitted to the English proceedings and then sought vexatiously to

extricate himself from the consequences of that submission or oppressively to prolong or multiply the litigation by commencing further proceedings abroad.

As regards Teare J's reliance upon the Russian proceedings being commenced with a view to frustrating the determination of the English proceedings, the Court of Appeal found that this position was unjustified. In particular, it took into account in making this decision that (i) at the time that JFC commenced proceedings in Russia there was no valid claim in England, (ii) as JFC could, and did, refuse to submit to the English proceedings, this would

have an impact upon the ability of Star Reefers to enforce its English judgment in Russia without issuing fresh proceedings in Russia. Furthermore, Teare J appeared to place reliance on the facts that the Russian proceedings were commenced without any warning and without any express rejection of liability under the Letters of Guarantee. Rix LJ considered that this "is hardly the stuff of unconscionable or vexatious conduct".

As regards the second major reason relied upon by Teare J, namely the apparent weakness of JFC's case under Russian law, he recognised that he could not resolve the issue which arose on the experts' reports as to Russian substantive law, namely whether or not under Russian law it was necessary for the offers of guarantee to be accepted. Rix LJ found that whilst he was entitled to take into account his view of the apparent weakness of JFC's claim in Russia, "he was hardly entitled to found himself on it as one of his two principal reasons for finding JFC's conduct to be vexatious". Rix LJ suggested that it would be necessary for the foreign proceedings to be "based on a hopeless claim, or one doomed to failure".

Rix LJ went as far as to say that it appeared to him that there was "something of a touch of egoistic paternalism in an English court

injunction continuation of the foreign proceedings" in this case.

Rix LJ also expressed the view that "the considerations of comity should have in any event caused the English court to pause long and hard before granting an injunction in such a case." He observed that the case consisted of "a typical battle of forums (or fora) between an English claimant who seeks to invoke English principles of private international law and thus English substantive law, and a foreign claimant who seeks to invoke the principles of private international law and thus the substantive law of another country". He went on to find that on the evidence before the court the English proceedings were very likely to have been completed before the Russian proceedings and that it would not therefore be necessary to grant an anti-suit injunction to protect the English proceedings.

CONCLUSION

The judgment of the Court of Appeal provides useful guidance as to the meaning of vexatious conduct and the importance of considerations of comity in the context of anti-suit injunctions.

In deciding to set aside the anti-suit injunction, the Court of Appeal appeared to be heavily influenced by the facts that JFC had not submitted to the English proceedings, Star Reefers had already obtained a judgment in its favour in the English proceedings and it would be likely to have to commence proceedings in Russia in order to enforce that judgment in any event.

On a practical level, the case illustrates that in the absence of an exclusive jurisdiction or arbitration clause and where there is more than one appropriate jurisdiction, a significant advantage can be obtained by acting quickly to commence proceedings in a jurisdiction in which a party believes it has the greatest advantage. Often this may be the 'home advantage' of a legal system which is likely to be more sympathetic to that party's case. In this case, JFC obtained an advantage since it would be difficult for Star Reefers to enforce an English judgment in Russia given the existence of the Russian proceedings. The Court of Appeal did not see anything wrong in this approach. ■