

Neutral Citation Number: [2012] EWHC 3925 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Rolls Building,  
110 Fetter Lane,  
London EC4 1NL

Monday, 17 December 2012

BEFORE:

**MR JUSTICE POPPLEWELL:**

BETWEEN:

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**NAVIG8 PTE LIMITED**

Claimant

- and -

**AL-RIYADH CO**

Defendant  
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MR M COLLETT (Instructed by Jackson Parton) appeared on behalf of the Claimant

MR L PEARCE (Instructed by Holman Fenwick Willan LLP) appeared on behalf of the Defendant

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**APPROVED JUDGMENT**

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165 Fleet Street, 8th Floor, London, EC4A 2DY

Tel No: 020 7421 4046 Fax No: 020 7422 6134

Web: [www.merrillcorp.com/mls](http://www.merrillcorp.com/mls) Email: [mlstape@merrillcorp.com](mailto:mlstape@merrillcorp.com)

(Official Shorthand Writers to the Court)

J U D G M E N T

MR JUSTICE POPPLEWELL:

1. This is an application which is made by the claimant in relation to listing of two applications: one is the claimant's application for summary judgment, the other is the defendant's application challenging the jurisdiction of the court.
2. The background is that the claimant, Navig8, is a Singaporean company which was the time charterer of the "Lucky Lady". The defendant, Al-Riyadh Company, was the receiver of a cargo of palm oil which was shipped on board the vessel in Malaysia for carriage to Aqaba in Jordan. The defendant is a Jordanian company, and the cargo had been purchased by it from Pacific Interlink. On 2 February 2012 Al-Riyadh commenced proceedings in the Aqaba Court of First Instance against Pacific Interlink as seller and against Navig8 as the carrier, claiming in relation to the alleged deficient quality of the cargo upon arrival. The claim against Navig8 was made under the bills of lading. Navig8 maintains that, as time charterers and not owners, Navig8 was not a party to the contract of carriage contained in or evidenced by the bills of lading.
3. On 10 May 2012 Navig8 commenced these present proceedings in the Commercial Court. In them it seeks, firstly, an anti-suit injunction restraining Al-Riyadh from further prosecuting the Jordanian proceedings; and, secondly, declarations of non-liability in relation to the substantive claim which forms the subject matter of the Jordanian proceedings. The declarations which are sought were identified in particulars of claim which were served on 19 June. Paragraph 12 seeks declarations that:

“(1) Navig8 are not party to the contracts contained in or evidenced by the Bills of Lading.

(2) Navig8 were not at any material time bailee of or in possession of the cargo to which the Bills of Lading relate.

(3) Navig8 are under no liability to Al-Riyadh in respect of the cargo to which the Bills of Lading relate.”

The relief claimed constitutes those declarations, a final injunction restraining further pursuit of the Jordanian proceedings, and equitable damages arising out of the prosecution of the Jordanian proceedings.

4. On 9 May, i.e. the day before these proceedings were issued, an application was made to Hamblen J for permission to serve the proceedings out of the jurisdiction and for an interim anti-suit injunction. He granted permission to serve the proceedings out of the jurisdiction, but refused the *ex parte* application or the interim anti-suit injunction. On 6 June Al-Riyadh entered an acknowledgment of

service indicating an intention to contest jurisdiction, and on 27 July Al-Riyadh issued an application challenging the jurisdiction of the court under CPR 11, seeking orders setting aside service of the claim form. Essentially the grounds were, firstly, that so far as the claim for an anti-suit injunction or equitable damages were concerned, there was no gateway jurisdiction and that those claims had no real prospect of success; and, so far as the negative declaratory relief was concerned, England was not the proper forum. It was accepted in the latter respect that there was an arguable basis for contending that the bills of lading were governed by English law.

5. On 14 September Navig8 served its evidence in opposition to the jurisdiction challenge. That evidence foreshadowed an application which was not in fact issued until some two months later, namely an application for summary judgment on part of the declaratory claims. On 14 November that summary judgment application was issued. It sought summary judgment on the declarations under paragraph 12(1) and (2) of the particulars of claim, but not summary judgment on the declaratory relief sought in paragraph 12(3) of the particulars of claim, nor summary judgment in relation to the claim for an anti-suit injunction.
6. Correspondence had already by that time addressed a dispute as to whether such application could or should be heard at the same time as Al-Riyadh's jurisdiction challenge, and on 26 November the court directed that a hearing should take place to resolve the question of listing, which is the issue that comes before me this afternoon.
7. The application made by Navig8 is that the two applications should be listed together on the basis that the judge hearing the applications should then be in a position to decide in which order to hear them and whether it is appropriate to determine the summary judgment application immediately after the jurisdiction challenge.
8. Under CPR 24.4 no application for summary judgment may be made before a defendant has entered an acknowledgment of service, unless the court gives permission. An acknowledgment of service by a foreign defendant who indicates an intention to challenge jurisdiction under CPR 11(2) does not count as such an acknowledgment of service, because if the jurisdiction challenge fails, CPR 11(7) provides that the first acknowledgment of service shall cease to have effect, and that the defendant shall have a further period of 14 days (or such other period as the court shall decide) in which to enter a further acknowledgment of service.
9. The application before me is not in form an application for permission under CPR 24.4. Mr Collett, who appears on behalf of Navig8, suggests that that application for permission will fall to be determined by the judge before whom both applications are listed, if that were the listing decision I were to make today. On behalf of Al-Riyadh, Mr Pearce submits that the court ought today to decide whether it would be right to have the summary judgment application determined immediately following the jurisdiction challenge.

10. The principles governing whether it would be right for that course to be adopted were considered by Rix J (as he then was) in European Capital Trade Finance Ltd v Antenna Hungaria RT [1995] CLC 530 in relation to the procedure which was then applicable under the Rules of the Supreme Court. The principles were revisited by Lewison J (as he then was) in Speed Investments Ltd v Formula One Holdings Limited [2005] 1 WLR 1233, in which he decided that, under the Civil Procedure Rules, the same philosophy and principles should apply. In essence, the gravamen of both those decisions is that it is only in very rare cases that the summary judgment application should be heard immediately after the jurisdiction challenge, with them listed to be heard at the same hearing. There are two reasons for that being the case. The first is that the Rules contemplate that a foreign defendant who has entered an acknowledgment of service indicating an intention to challenge jurisdiction should have a further opportunity, once that jurisdiction challenge has failed to consider whether to contest the claim on the merits and thereby participate, or whether to take no part in the English proceedings, with the potential effect that that may have in relation to the enforcement of any judgment. CPR 11(7) envisages that the normal position will be that a defendant will have a further 14 days in which to consider his position, although the court has power to extend or abridge that period.
11. The second reason why it will only be in very rare cases that the summary judgment application will be listed to be heard at the same time and immediately following the jurisdiction challenge, is that it is wrong in principle for a foreign defendant, who is challenging the jurisdiction of the English court to determine the claim on the merits, to have to prepare for a hearing on the merits by preparing for the summary judgment application, before his jurisdiction challenge has been heard.
12. In the European Capital case Rix J said:

“That might not be unacceptable where the challenge to jurisdiction fails, but it is plainly contrary to principle where the challenge is a valid one and, at the time when preparations would have to be put in hand, it would not be known whether the challenge would succeed or fail. It may seem unfortunate to a plaintiff with an unanswerable claim that a foreign defendant may hold up summary judgment first by a challenge to the jurisdiction and then by insisting on a further period to lodge his second acknowledgment of service. That, however, is the price such a plaintiff must pay out of regard for all those foreign defendants who, for reasons of comity, are to be allowed to challenge the jurisdiction of these courts without prejudicing or pre-empting their defence on the merits or their decision as to whether, if their jurisdictional challenge fails, they wish nevertheless to submit to the jurisdiction of the English courts.”
13. On behalf of Navig8, Mr Collett has submitted that the summary judgment application requires no or virtually no separate preparation by Al-Riyadh from the preparation that would be necessary for the purposes of the jurisdiction challenge. The summary judgment application depends, he submits, on a short construction

point as to what is meant by some words in the bill of lading, which is, he contends, a point on which Navig8 is obviously right, and any contrary argument would be hopeless. There are two difficulties with this submission. The first is that it is not for the court on a listing application to try to take a view on the merits of the issues which arise on a summary judgment application, still less to do so without the benefit of argument on such a point. To characterise any defence to the summary judgment application as hopeless is to put the cart before the horse. Secondly, it will inevitably be the case that at least some expense will be involved in the exercise of addressing the merits, even if it is “only” a construction point. I am unable to judge how expensive it will be and how time consuming without being appraised of the arguments, but it is at least possible (to put it no higher) that there might be questions of Jordanian law involved, or that there might be questions of factual matrix. But the most important consideration is that, whatever the extent of the expense, it would be wrong in principle that a defendant in the position of Al-Riyadh should be required to incur any expense in seeking to meet an application for summary judgment whilst its jurisdiction challenge is pending.

14. Mr Collett submits that this is a case in which there ought to be an opportunity for the judge who has heard the jurisdiction challenge to consider at that stage whether it is an appropriate case for permission to be granted under CPR 24.4, and for abridging the time envisaged under CPR 11(7), so that the gap between the two applications will be sufficient time to afford Al-Riyadh the opportunity to make its decision as to whether it wishes to enter a further acknowledgment of service and address the claim on the merits. Mr Collett submits that, given the very limited nature of any dispute that might be available in relation to the summary judgment application, and given the periods of time involved, Al-Riyadh have ample time now to consider in advance what its stance will be in the eventuality that its jurisdiction challenge fails.
15. There are however, in my judgment, substantial difficulties in the way of that submission. First, it assumes that an immediate ex tempore judgment will be given at the end of the oral hearing of the jurisdiction challenge. I am not in a position to have any confidence that that will necessarily be the case. If it is not the case and the court reserves its judgment on the jurisdiction challenge, then there will inevitably be a greater cost and expense incurred in having taken the course for which Mr Collett contends, even if the decision is to reject the jurisdiction challenge and Al-Riyadh’s decision is then to participate and to contest the summary judgment application. That is so because it is always the case that some additional expense is incurred by preparing for a hearing which then does not take place and has to be restored at a later date.
16. The further difficulty with Mr Collett’s submission in this respect is that it could be said in almost every case that a defendant making a jurisdiction challenge would have a sufficient opportunity in advance to consider what its position would be if and when the jurisdiction challenge failed. If he were right in saying that as a matter of listing they should be listed together, then that would make such listing the norm rather than the exception. But CPR 11(7) envisages that the norm should be a further period of 14 days in which a defendant who has unsuccessfully challenged the jurisdiction of the court should be given the opportunity to give

further consideration as to whether it wishes to enter an acknowledgment of service.

17. In the European Capital Trade case, Rix J said that one of the purposes of the previous procedure under the Rules of the Supreme Court, and one of the reasons why the practice under the Rules of the Supreme Court had been changed from earlier practice under the RSC was,

“to give a foreign defendant who wished to challenge the jurisdiction a real opportunity to decide whether or not to submit to the jurisdiction of the English court *after* [emphasis added] his challenge to the jurisdiction had been heard and decided.”

18. In a case such as the present, there would not, in my view, be any undue delay or any unfairness if the summary judgment application has to await the outcome of the jurisdiction challenge and be listed for a further subsequent hearing should the jurisdiction challenge fail. The substantive relief which is ultimately sought by Navig8 in these proceedings is an injunction to restrain the Jordanian proceedings, but that is not the immediate subject matter of the summary judgment application. The summary judgment application proceeds on the basis that it seeks declarations in two of the three respects which are identified in the particulars of claim. Mr Collett has explained that the purpose of that is so that, armed with such a summary judgment, Navig8 could then make a further application for summary judgment for a permanent anti-suit injunction. It is clear, therefore, that the summary judgment application which Navig8 now seek to have listed at the same time as the jurisdiction challenge will not itself have any immediate practical effect on the Jordanian proceedings. In any event, the evidence is that the Jordanian proceedings will take some 5 to 7 years to resolve. There is no evidence that anything will or might happen in Jordan in the immediate future which would cause any significant prejudice to Navig8 if the listing of the applications takes place sequentially in the usual way.

19. Navig8 cited no case in which the court had adopted the course which Mr Collett urges upon me which involved a foreign defendant. Navig8 did, however, rely on the decision of Stephen Males QC (as he then was), sitting as a Deputy Judge of the High Court, in Moloobhoy v Kanani [2012] EWHC 1670 (Comm). In that case a jurisdiction challenge and a summary judgment application had been directed to be heard together by Gloster J, although it is not apparent from the report as to whether there was anything controversial about that course being adopted in that case. Having rejected the jurisdiction challenge, Mr Males QC went on to address the question as to whether the court should proceed immediately to determine the claimant’s application for summary judgment. He decided that it could. However, that was a very different case, because that was not a foreign defendant in respect of whom permission had had to be sought to serve out of the jurisdiction, but was a domestic defendant resident within the jurisdiction who was amenable to the court’s jurisdiction. For those reasons, as Mr Males QC himself pointed out at paragraph 83, the underlying philosophy behind the decisions in Speed Investments and European Capital Trade Finance simply did not apply.

20. For all those reasons, I shall not direct that the two applications be listed together. The jurisdiction challenge will be listed and the summary judgment application will have to await listing depending on the outcome of the jurisdiction challenge.

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