



Neutral Citation: [2019] EWHC 2658 (Comm)

Case Nos: CL-2019-000216 AND CL-2019-000220

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 10 October 2019

Before :

ANDREW BURROWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

Between :

Clearlake Shipping Pte Ltd
Gunvor Singapore Pte Ltd

Claimants

- and -

Xiang Da Marine Pte Ltd

Defendant

Mr Marcus Mander (instructed by **Kennedys Law LLP**) for **Clearlake Shipping Pte Ltd**
Mr Oliver Caplin (instructed by **Hill Dickinson LLP**) for **Gunvor Singapore Pte Ltd**

JUDGMENT ON CONSEQUENTIAL MATTERS

ANDREW BURROWS QC:

1. INTRODUCTION

1. I gave judgment on the central matters in this dispute on 22 August 2019: see [2019] EWHC 2284 (Comm). In particular, I held that Clearlake Shipping Pte Ltd ('Clearlake') is entitled to an interim anti-suit injunction to prevent the letter of indemnity claim by Xiang Da Marine Pte Ltd ('Xiang Da') against Clearlake proceeding in Singapore; and that Gunvor Singapore Pte Ltd ('Gunvor') is entitled to an interim anti-suit injunction to prevent Xiang Da's tortious misrepresentation claims against Gunvor proceeding in Singapore. I am now concerned with consequential matters in relation to that judgment, namely the precise form of the interim injunctions, applications for alternative service, and costs.
2. In relation to these consequential matters, I have had written submissions from Mr Marcus Mander for Clearlake and from Mr Oliver Caplin for Gunvor both dated 4 October 2019. Subsequent to the handing down of my August judgment, Holman Fenwick Willan LLP, who were the solicitors for Xiang Da, and Sara Masters QC, who was instructed on behalf of Xiang Da, have confirmed that they are no longer instructed by Xiang Da although no notice of change of solicitor or order entitling Holman Fenwick Willan LLP to come off the record has been received. In the circumstances, Holman Fenwick Willan LLP has continued to be copied in to all relevant correspondence. I understand that all relevant correspondence has also been passed to Xiang Da's Singapore lawyers Asia Legal LLC and sent directly to Xiang Da at its registered office in Singapore. But, as was anticipated, no written submissions on behalf of Xiang Da have been received on the consequential matters with which I am now dealing.

2. THE PRECISE FORM OF THE INJUNCTIONS

3. As regards the precise form of the injunctions, I should clarify that, until my order takes effect, the interim injunctions granted by Bryan J in this court at the 'without notice' hearing on 16 April 2019 continue to apply.
4. I have considered the form of the interim injunctions set out by Mr Mander and Mr Caplin in their agreed written attachment headed 'Injunction and Order' and the explanations put forward in their submissions (see especially paragraphs 6 and 8(a) of the submissions on behalf of Clearlake). I agree with what is there said and with the form of the injunctions as now set out in paragraphs 1 and 2 of my attached order.

3. ALTERNATIVE SERVICE

5. Both Clearlake and Gunvor seek permission to serve the Order on Xiang Da and its directors by alternative service pursuant to CPR 6.15(1), 6.27, 6.37(5)(b) and/or 81.8. To be specific, they seek permission to effect service by letter sent by post to Xiang Da's registered office in Singapore and/or by hand or email on Holman Fenwick Willan LLP.
6. The essential question I have to answer, in the exercise of my discretion, is whether, in all the circumstances of the case – and I have at the forefront of my mind here the serious consequences of failing to comply with an injunction - there is a good reason to

authorise alternative service. This is essentially a matter of fact: see *Abela v. Baadarani* [2013] UKSC 44, [2013] 1 WLR 2043 at [33] and [35].

7. In this case the alternative service for which permission is sought should be granted for the following main reasons:
 - (a) It is inherently desirable that an injunction order should be served as soon as possible. It should be noted that this was an underlying reason for Bryan J's decision to allow alternative service (by service on Xiang Da's Singapore solicitors, Asia Legal LLC) in relation to the interim injunctions he granted at the 'without notice' hearing: see [2019] EWHC 1536 (Comm) at [85]-[92] and [96]-[97].
 - (b) To grant permission for alternative service will help to ensure that the Court's order can be enforced against Xiang Da's directors. Since the whereabouts of Xiang Da's directors is unknown, it is not in practice possible to effect service on them personally, or to do so would entail considerable but unnecessary additional time and costs.
 - (c) Since Holman Fenwick Willan LLP remain on the record and no new address for service has been provided by Xiang Da, service upon Holman Fenwick Willan LLP remains appropriate notwithstanding that they are without instructions (see CPR 42.1(1) and 42.2(5)).
 - (d) There is a high degree of likelihood that the contents of the order will be communicated to Xiang Da and its directors if permission is granted for the alternative service sought.
 - (e) There is evidence that the methods proposed are not contrary to the law of the country where the injunction order is to be served (see the First Witness Statement of Karnan Thirupathy at [99] [1/5/49]).

8. It follows from this that paragraphs 3-5 of the order are appropriate.

4. COSTS

9. Applying the general rule (see CPR 44.2(2)(a)) – and there is no reason here not to apply that general rule - Clearlake and Gunvor, as the successful parties, are entitled to their costs from Xiang Da. But should those costs be assessed on the standard basis or the indemnity basis?
10. It is clear that they should be assessed on the indemnity basis. There are decisions of Colman J (in *A v B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 Lloyd's Rep 358, at [6]-[15] and *National Westminster Bank Plc v Rabobank Nederland (No 3)* [2007] EWHC 1742 (Comm), [2008] 1 Lloyd's Rep 16, at [31]-[39]) that indicate that the normal rule in relation to the costs of successfully obtaining anti-suit injunctions on the contractual basis (eg for breach of an exclusive jurisdiction clause) is that the indemnity basis should apply. The rationale appears to be that because the contractual clause in question was precisely concerned to stop the foreign proceedings, and thereby to avoid the legal costs incurred by reason of that breach, the costs reasonably incurred should be recoverable irrespective of proportionality. In line with the general approach to deciding whether the indemnity basis should be applied, one can say that a defendant who has been in breach of an exclusive jurisdiction clause has acted 'out of the norm'

(see Colman J in *A v B (No 2)* at [15]). That all applies straightforwardly in this case to the costs of Clearlake whose application for an anti-suit injunction rested on the contractual basis.

11. The same also applies, by analogy, where the anti-suit injunction rests on the ground that the foreign proceedings are otherwise vexatious or oppressive. Indeed that terminology leads very naturally to the conclusion that the defendant was acting 'out of the norm'. So, as regards Gunvor's application, as I explained in my judgment at [34](ii), Xiang Da manipulated its third party claims to try to avoid being caught by the exclusive jurisdiction clause in the Clearlake charter. The interim injunction granted to Gunvor rested on the foreign proceedings being vexatious and oppressive and Xiang Da's conduct, vis-a-vis Gunvor, was 'out of the norm'. Gunvor's costs should therefore also be assessed on the indemnity basis.
12. Counsel for Clearlake and Gunvor have urged me to make a summary assessment of costs. But I do not consider this appropriate where the costs claimed are well in excess of £100,000 – Clearlake is claiming £369,807.40 and Gunvor £212,823.31 - and where the hearing before me lasted two days. While I appreciate the difficulties caused to Clearlake and Gunvor by Xiang Da's approach since the handing down of my judgment, the appropriate order is for a detailed assessment of the costs if not agreed.
13. In accordance with CPR 44.2(8), Clearlake and Gunvor should be granted an order for the payment of a reasonable sum on account of costs unless there is good reason not to do so. There is no such good reason here. Taking what I consider to be an appropriate percentage of 70% where the costs are awarded on the indemnity basis, Xiang Da shall pay Clearlake £258,865 on account of costs within 14 days and shall pay Gunvor £150,000 on account of costs within 14 days.

5. THE ORDER

14. The other paragraphs of the order (paragraphs 6-9) are entirely straightforward and reflect aspects of my August judgment. I need say nothing further about them.
15. I attach the order which reflects that August judgment and this judgment; and I thank Mr Mander and Mr Caplin for their assistance.