Neutral Citation Number: [2020] EWHC 142 (Comm)

Case No: CL-2019-000518

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

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MASTER COOK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2020

Before :

MR. JUSTICE TEARE

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Between :

THE KINGDOM OF SPAIN	**Original Applicant but Respondent to the Appeal**
- and -	
THE LONDON STEAM-SHIP OWNERS' MUTUAL INSURANCE ASSOCIATION LIMITED	**Original Respondent but Appellant in the Appeal**

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Lionel Persey QC, Michelle Butler, Koye Akoni and Jamie Hamblen (instructed by **Squire Patton Boggs**) for the R**espondent**
Christopher Hancock QC and Alexander Thompson (instructed by **Ince Gordon Dodds LLP**) for the **Appellant**

Hearing date: 24 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr. Justice Teare:

1. This is a Case Management Conference ("CMC") in an appeal brought by the London Steam-ship Owners' Mutual Insurance Association Limited ("the Club") from an order of Master Cook pursuant to which a Spanish judgment was registered. The Kingdom of Spain ("Spain") had obtained the registration order against the Club and is therefore the respondent to this appeal. The Spanish judgment concerned liability for the pollution damage caused when the vessel PRESTIGE broke in two off the coast of Spain in 2002.

2. The parties have been in dispute about liability for many years. Criminal proceedings were brought against the master of PRESTIGE in Spain in 2002 and, after the conclusion of the investigative stage of the proceedings, civil proceedings were brought against the master, the Owners of PRESTIGE and the Club, as liability insurer of the Owners, in 2010. (I am told that in addition to Spain there are some 264 other claimants.) In 2012 the Club commenced arbitration proceedings in London against Spain and in February 2013 obtained an award from the sole arbitrator Mr. Alistair Schaff QC which declared that, as a result of the "pay to be paid" clause in the policy the Club had no liability to Spain. In this court Spain challenged the jurisdiction of the arbitrator but the court (Hamblen J. as he then was) held in 2013 that the arbitrator had jurisdiction. Later that year the court in La Coruna dismissed the civil claim against the master, Owners and Club but convicted the master of the crime of disobeying orders by the Spanish authorities to accept a tow of the vessel. In 2015 the English Court of Appeal upheld the decision of Hamblen J. In 2016 the Spanish Supreme Court reversed the decision of the court in La Coruna and held that the master had been seriously negligent and that the Owners and Club were liable for the damage caused. In execution proceedings in Spain, the court in La Coruna declared the Spanish State entitled to enforce a claim up to approximately €2.355 billion against the defendants in the Spanish proceedings and declared the master, Owners and the Club liable in respect of the claims, although subject (in the case of the Club) to a global limit of liability in the sum of approximately €855 million.

3. Thus the Club has an arbitration award in its favour but Spain has a judgment of the Spanish Supreme Court in its favour. Spain obtained an order from Master Cook pursuant to which the Spanish judgment was registered so that it could be enforced here against the Club. The Club seeks to appeal from that order. One of the grounds on which it seeks to appeal is that the Spanish judgment is irreconcilable with the judgment of Hamblen J. and the Court of Appeal (Article 34.3 of the Brussels Regulation). Another ground is that recognition of England is contrary to the public policy of England (Article 34.1).

4. That very short account of a long history of litigation and arbitration in this case is sufficient to show that this is a somewhat striking case. Spain is seeking to enforce a decision of the Spanish Supreme Court in England in circumstances where the English court has held that the arbitrator, who found that the Club had no liability to Spain, had jurisdiction to make an award against Spain. It is not surprising that the Club has launched a major appeal against registration of the Spanish judgment in England. Equally, it is not surprising that Spain wishes to oppose the appeal.

5. On this CMC disclosure is sought by the Club. Spain resists disclosure on the grounds that there is nothing in the CPR which requires disclosure on an appeal and that in any

event the making of an order for disclosure would be inconsistent with the policy of the Brussels Regulation which seeks to provide for the rapid and simple recognition and enforcement of a judgment issued in a member state. The dispute as to disclosure is one of importance such that, although this was a CMC, I did not consider it wise to give a ruling immediately after the oral argument.

Disclosure

6. It is common ground, having regard to the fact that the Spanish proceedings were commenced prior to 10 January 2015, that the relevant Brussels Regulation is Brussels 1 (as opposed to Brussels Recast) and that the applicable procedural rules are those in the 2014 White Book, namely, CPR 74.8.

7. CPR 74.8 provides that an appeal pursuant to the Brussels Regulation must be made in accordance with CPR Part 52, save that permission to appeal or put in evidence is not required.

8. CPR Part 52 makes no express provision for disclosure on an appeal. However, counsel for the Club relied upon CPR Part 52.20(1) which provides that:

> "In relation to an appeal the appeal court has all the powers of the lower court."

9. Counsel submitted that since the lower court has power to order disclosure the appeal court must have the same power. Counsel for Spain did not accept this submission and said that CPR 52.20(1) had nothing to do with an appeal under the Brussels regulation. However, CPR 74.8 is expressly concerned with such appeals and expressly states that CPR 52 applies to such appeals (except where provision is made to the contrary). Counsel for Spain also said that CPR Part 52.20(2) indicated the types of power the appeal court had and they were not relevant to an appeal under the regulation. But the powers there listed appear to be the powers of the court after it has determined the appeal and do not limit the powers conferred upon the appeal court by CPR Part 52.20(1). The question therefore is whether CPR Part 52.20(1) confers power upon the appeal court to order disclosure.

10. A lower court has power to order disclosure where there is a claim; see CPR Part 31.1(2). There is no reason why a claim for registration of a foreign judgment should not be regarded as a claim. The circumstances in which the master dealing with such a claim might wish to order disclosure will be rare but I do not see why the master would not have such power were it, unusually, appropriate. If so the court hearing the appeal would have the same power pursuant to CPR 52.20(1).

11. I was not referred to any authority in which an appeal court had ordered disclosure but *Disclosure* 5th.ed. by Mathews and Malek states that that CPR 52.20(1) (or rather its predecessor CPR 52.10(1)) does provide the necessary power. Further the editors referred to one (or possibly two) cases in which the appeal court dismissed an application for disclosure for the purposes of a pending appeal on the grounds that the documents sought were not relevant to the issues on the appeal. I therefore accept that the court hearing an appeal has power to order disclosure on an appeal and that, since CPR 74.8 incorporates CPR 52, a court hearing an appeal from an order registering a foreign judgment has such power.

12. That said, there will be few cases where it will be appropriate to order disclosure. First, the grounds for appealing against a registration order are limited to cases where recognition is manifestly contrary to public policy, where the defendant had not been served with the proceedings and where recognition was irreconcilable with another judgment; see article 34 of the Regulation. There will rarely be a need for disclosure in such cases. Second, the primary means by which the court hearing an appeal would be informed of any factual matters relevant to the appeal would be by "evidence" (which CPR 74.8 expressly permits). Third, it has recently been stated by the Court of Appeal that the objective of the Brussels Regulation is the "free movement of judgments" between member states, so enhancing the sound operation of the internal market, and that the scheme of the Regulation is designed to bring about "the "rapid, simple, and efficient recognition and enforcement in one member state of a judgment given in another"; see *National Bank of Greece v Christofi* [2019] 1 WLR 1435 at paragraph 58 per Gross LJ. Having regard to that objective the court will be reluctant to order disclosure unless it is strictly necessary and appropriate. Otherwise the need to give disclosure would or might slow and make less simple the prosecution of an appeal pursuant to the Regulation.

13. It is therefore necessary to consider carefully whether the disclosure sought in the present case is necessary and appropriate on this appeal.

14. There were two classes of documents in respect of which it was said to be appropriate for Spain to carry out Model D search based disclosure.

15. The first related to Issue 1(4) of the List of Issues which is in these terms:

> "Are the English Judgments not qualifying judgments within article 34(3) because the English Judgments conflict with Section 3 of Chapter II of the Brussels 1 Regulation ? In particular …(b) Is the respondent [Spain] entitled to rely on the exclusive rules for jurisdiction in Section 3 of Chapter II. In particular: (i) Is the respondent [Spain] a qualifying party that is entitled to the protective rules in Section 3 ?"

16. This obscurely described issue is apparently clear to the parties. I was told that the issue arose from the contention of Spain that the English court ought to have declined jurisdiction because the case concerned a matter relating to insurance within Section 3 of the Regulation and so, pursuant to articles 9 or 11 of the Regulation, the Club ought to have been sued in Spain where the claimant was domiciled. For that reason, it is said, the judgment of the English court is not a relevant judgment for the purposes of article 34(3). In response the Club states that it is necessary for Spain to show that it is a member of the class protected by Section 3, which excludes "professionals in the insurance sector or entities regularly involved in the commercial or otherwise professional settlement of insurance related claims who voluntarily assumed the realisation of the claim as part of its commercial or otherwise professional activity"; see *Aspen Underwriting v Credit Europe Bank* [2019] 1 Lloyd's reports at paragraphs 112-115. It will therefore be necessary, submitted counsel for the Club, for Spain to disclose documents which show "the class of business" conducted by it. If it is a member of the relevant class it can rely on section 3. If it is not, it cannot.

17. Spain is yet to provide its evidence on this and other issues. Since it has raised this point on Section 3 I anticipate that it will say that as a state the class of business it conducts is government or statecraft, and not insurance. However, I also anticipate that the Club will say that that is not the whole story and that there must be major parts of Spain's work which involves the commercial settlement of insurance claims.

18. I am not willing to order Spain to conduct a search for relevant documents under this head because there must be a vast amount of them which, once disclosed, will never be looked at again. I think the preferable solution is for Spain to provide its evidence on this topic and to do so in a fair manner, that is, one which gives a balanced view of its activities and in particular of the involvement which it has with insurance. I do not know whether there is a department of state which deals with insurance of government property and activities. But if there is, it should be dealt with. If Spain gives a fair and candid assessment of its activities, and in particular of its involvement with insurance, then that ought to be sufficient to enable this particular issue to be debated fairly and satisfactorily. If the Club considers that Spain has not given a fair and candid assessment then it may make, if it can, a focussed application for disclosure. But I very much hope that that would not be necessary.

19. The second class of document of which disclosure is sought is very different and relates to the public policy defence.

20. Issue 2(9) is a question of fact. Did the Spanish Courts refuse to allow the master to participate in an underwater investigation of the strength of the vessel's hull and refuse to disclose the results of the investigation (so that there was a breach of the master's right to equality of arms and to be able to prepare a defence) or were the results disclosed to the master in sufficient time to allow him to prepare his defence. The Club therefore seeks disclosure of the documents relating to that question held by Spain.

21. However, it is Spain who contends that the results of the investigation were disclosed to the master in sufficient time. Spain's evidence can therefore be expected to support this case and to rely upon the documents which show when the results were disclosed to the master and in what terms. If the evidence does not deal with this issue then Spain will be unable to advance its factual case. I therefore consider it very likely that no disclosure under this head will be required. In the unlikely event that it is required a focused application can be made after Spain has provided its evidence.

Expert evidence

22. The parties are agreed that they should be given permission to adduce expert evidence on Spanish criminal and civil law. I am content with that so long as the issues on which such expert evidence is to be given are identified with precision. They appear to be the following: (i) what provision is made in Spanish law for the master to participate in the underwater investigations and to be informed of the results of those investigations, and (ii) whether the master could and should have taken the Human Rights and res judicata points now relied upon. I shall leave the precise drafting of the issues to counsel but it is important that the issues be identified with precision so that the experts do not range over the entire case.

23. In addition the Club wishes to adduce evidence of a naval architect on the question whether the results of the underwater inspections enabled conclusions to be drawn as to the strength of the hull and if so what those conclusions were. These were said to be relevant because if a breach of the master's right to fair trial or to equality of arms is established it must further be shown that such breach might have made a difference.

24. Counsel for Spain objected to the admission of such expert evidence on the grounds that it did not relate to any of the agreed list of issues and also that it conflicts with Article 45 of the Regulation which provides that "under no circumstances may the foreign judgment be reviewed as to its substance".

25. I consider that the need for the requested expert evidence arises from issue 9. If the master was not provided with the results of the underwater investigations that failure must be shown to be relevant on the facts of the case. For that purpose I accept that the suggested naval architectural evidence is or may be relevant. Of course, if the results of the investigations did not form the basis of the master's conviction as alleged by Spain then the evidence may prove to be irrelevant. But that cannot be decided today.

26. I accept that the Spanish judgment cannot be reviewed as to its substance but that is a matter to be borne in mind at the hearing of the appeal. It does not follow that permission for the requested expert evidence (which is of a very narrow compass) should be refused.

27. I will therefore give permission for this naval architectural evidence. The issue to which it relates must be drafted by counsel and with precision.

28. It seems to me that on both issues it makes sense for the Club to provide its evidence first. That is because it must seek to establish its case. Spain will be able to respond to the points made and there will be less risk of "ships passing in the night".

Time table for directions

29. Since I have decided that there should be (at least at present) no disclosure as such and that there should be a consecutive, not concurrent, exchange of expert evidence the format of the directions order should follow that of Spain (tab 6B of the bundle).

30. However, there remains a question as to the timing of witness statements, expert evidence and the date of trial.

31. Spain's directions provide for exchange of evidence of fact between 21 February and 17 July 2020 and for exchange of expert evidence between 24 April and 17 July 2020 with a trial of 5-6 days not before 1 October 2020.

32. The Club's directions provide for exchange of evidence between 20 March and 8 September 2020 and for an exchange of expert evidence between 16 October and 18 December 2020 with a trial of 5-6 days not before 1 February 2021. The Club suggests that Spain's timetable is too tight and has informed me that its leading counsel (who has been involved in the case for some years) is not available in October 2020.

33. There does not appear to me to be any good reason for not adopting Spain's timetable for the exchange of evidence (factual and expert) before the Long Vacation. The Club has obviously given considerable thought to its appeal and has served (all or most of) its factual evidence. I am not persuaded that all evidence should not be exchanged before the Long Vacation.

34. However, there may be limited issues of disclosure to be resolved after the exchange of such evidence and the timetable should allow for that. A trial on the first date available after 1 October 2020 would not do that. Further, the Club's leading counsel is not available in October and in view of his long involvement in the case it might be unfair to deprive the Club of his services. A trial in November may not give sufficient time to deal with any disclosure issues.

35. If the trial is fixed for 5-6 days in December 2020 that will give sufficient opportunity for any disclosure issues to be resolved and for any required disclosure to be ordered, given and considered before the trial. A trial in November 2020 might be possible but may not give sufficient time to deal with any disclosure issues.

36. I shall therefore order that the trial be after 1 December 2020. The pre-trial review (for half a day) should be in the first week of November 2020.

37. There is one further matter. If the Club's appeal fails there is or may be an issue as to how the fund of €855 million is to be distributed amongst the 265 claimants in the Spanish proceedings. The Club submitted that this matter be adjourned for consideration after the appeal has been resolved. (It will only arise in the event that the appeal fails.) Spain opposed this adjournment but suggested that the matter could be reviewed at the pre-trial review. That review could take place in the light of Spain's response to this issue (which, I was told, it had not yet considered).

38. Since the point appears to involve other parties who are not yet party to these proceedings it appears unlikely that this point can be resolved at the hearing of the appeal. I therefore agree that this point be adjourned until after the appeal is determined. If it appears desirable to make some further or additional order with regard to this issue at the PTR the matter can be considered then.