Neutral Citation Number: [2024] EWHC 3109 (Comm)

Case No: CL-2024-000640

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

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

Date: 3 December 2024

Before :

Mr Stephen Houseman KC
Sitting as a Deputy Judge of the High Court

- -

Between :

(1) Manta Penyez Shipping Inc.
(2) Uraz Shipping Inc. **Claimants**

- and -

Zuhoor Alsaeed Foodstuff Company

Defendant

- -
- -

Alexander Yean (instructed by **MFB Solicitors**) for the Claimant
The Defendant did not appear and was not represented
Hearing date: 3 December 2024

- -

Approved Judgment

I direct that 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 STEPHEN HOUSEMAN KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Tuesday 3 December 2024 at 14:00.

STEPHEN HOUSEMAN KC:

Introduction

1. Earlier today I heard the re-listed return date for interim anti-suit relief granted by Mrs Justice Dias DBE on 22 November 2024.

2. The claimants sought both negative (prohibitory) and positive (mandatory) anti-suit relief in respect of three sets of proceedings commenced by the defendant last month in Yemen, namely:

    a. arrest proceedings (initiated on 5 November) and substantive proceedings (initiated on 11 November) before the First Instance Commercial Court in Al Hudaydah; and

    b. subsequent substantive proceedings (initiated on/around 28 November, i.e. a few business days after the Order made by Dias J) in the Sana'a Commercial Court.

3. The defendant has been served with these proceedings pursuant to permission granted by Dias J and also notified of the present hearing. It has not participated. It should be noted, however, that the deadline for any acknowledgement of service as a Yemen-domiciled defendant is 30 days from deemed service, i.e. Monday 23 December at the earliest.

4. For reasons explained during the hearing, I am satisfied to the requisite standard that the defendant's commencement and pursuit of each of the three sets of Yemeni proceedings involves a breach of contract on its part as a matter of English law. In short:

    a. the arrest proceedings are contrary to an express covenant contained in clause 1 of a guarantee dated 11 September 2024 which one or both of the claimants is entitled to enforce as a matter of English law; and

    b. the substantive proceedings (as well as arrest proceedings) are contrary to a London-seat LMAA arbitration agreement contained in clause 28 of a charterparty dated 10 May 2024 which the first claimant is entitled to enforce as a matter of English law even though the second claimant is (mistakenly) named as defendant in one action in Yemen.

5. There are no strong reasons or other discretionary factors that militate against grant of interim anti-suit relief to uphold and enforce these jurisdictional covenants. The Yemeni proceedings appear on their face to involve a blatant jurisdictional violation by the defendant. It is just and convenient that the defendant, over whom this Court has *in personam* jurisdiction, be stopped from pursuing them any further.

6. The purpose of this short judgment is to explain my decision for granting interim mandatory injunctive relief and indemnity costs in favour of the claimants at today's hearing.

Interim Mandatory Injunction

7. It is the policy of English law and the courts in this jurisdiction to grant injunctive relief to uphold and enforce jurisdictional promises, whether express (as in the guarantee in this case) or necessarily implicit within an exclusive choice of forum (as in the charterparty in this case). Damages are not an adequate remedy for violations of such covenants, even if damages can also be recovered to compensate for proximate loss incurred through legal expenditure in dealing with jurisdictional wrongdoing.

8. This important policy underpins the familiar three-stage test which evolved out of *The Angelic Grace* almost three decades ago. *American Cyanamid* is not applied for interim injunctive relief in this context. Instead, if a claimant can show breach to the applicable standard of proof then the burden flips to the defendant to justify not being held to its promise by coercive remedy as distinct from damages alone. The grant of interim relief on this basis accordingly requires proof of more than a real prospect of success on breach, namely a high probability of success or high degree of assurance. The consequent reversal of burden is the *quid pro quo* for satisfaction of this substantive threshold.

9. This approach to contractual anti-suit relief is not grounded solely in public policy and is not confined to arbitration agreements. It reflects the practicalities of jurisdictional violations by contracting parties. Businessfolk choose governing law and dispute resolution regimes in the interests of certainty. Such choices calibrate their respective promissory interests. When an exclusive jurisdictional covenant is broken it can have significant impact upon those substantive promissory interests for a range of reasons beyond perceived 'home' or 'first mover' advantage on the part of the contract-breaker. It can mean a different system of law is applied to their contract or elements of it become unenforceable according to the public policy of a non-contractual forum. Having to deal with those risks presented through unlawful engagement of a court process is itself prejudicial.

10. The grant of a mandatory anti-suit injunction is normally reserved for a final hearing so as to avoid any prejudice that might flow if such remedy were granted on an interim basis only for the Court later to find it was not proven on a final basis. This in turn may justify expedition of the action itself in order to protect a claimant's legitimate interest in obtaining such final mandatory relief sooner rather than later. All things being equal in this context, as in many others, a mandatory injunction can be expected to be more effective than a prohibitory one. These labels are not, however, determinative. It is always a question of practical impact and weighing the balance of injustice: see *National Commercial Bank Jamaica Ltd. v. Olint Corporation Ltd. - Practice Note* [2009] UKPC 16; [2009] 1 WLR 1405 at [16]-[21].

11. There is no hard and fast rule about the non-availability of an interim mandatory anti-suit injunction:

a. Such orders are made on a narrow basis in certain circumstances - for example, requiring the defendant to seek an adjournment and/or stay in the first-seised foreign court in order to avoid prejudice to the claimant (as local defendant/respondent) in the meantime; requiring release of a vessel from arrest; or compelling a party to withdraw its own obviously unlawful or vexatious pre-emptive coercive counter-measure (e.g. anti-anti-suit or similar) in the foreign court so as to allow pursuit of anti-suit relief in this Court.

b. These remedies can also be broader and terminal, requiring the defendant to withdraw or discontinue the relevant foreign legal process, where this is necessary to achieve the ends of justice: see *Raphael: The Anti-Suit Injunction* (2nd ed. 2019) at 13.65 - 13.68.

12. An interim mandatory injunction requiring withdrawal or discontinuance of the relevant foreign proceedings may not, on proper analysis, be terminal or prejudicial to the relevant antagonist. This depends on local law and procedure on such matters, including the basis of such withdrawal or discontinuance and whether it forecloses re-litigation through concepts akin to abuse of process or preclusive doctrines. These effects can be ameliorated by an injunction claimant undertaking not to advance such arguments in the local court in the event that it fails to secure a final injunction in this Court, at any rate where there is no reason to doubt the efficacy of such undertaking in the local court system. The usual cross-undertaking in damages should cover the injunction defendant for added cost of stopping and re-starting the foreign proceedings where permissible.

13. I granted an interim mandatory anti-suit injunction in the present case, because I was satisfied that it is necessary in the interests of justice. The defendant has not participated in these proceedings despite being served and notified of this hearing; it commenced a fresh set of proceedings in Yemen despite the grant (and notification) of interim prohibitory injunctive relief; and there is (at least) a high probability of success on the breach analysis underpinning the anti-suit claim. Further, and at my insistence, the claimants have given an undertaking which protects the defendant against any prejudice it may suffer should it turn out that this interim injunctive relief should not have been granted, as described in generic terms in paragraph 12 above and in the absence of any reason to doubt its efficacy as a matter of Yemeni law and civil procedure.

Indemnity Costs

14. A contracting party who agrees exclusive English court forum or English-seat arbitration for disputes concerning their relationship with another can be taken to understand or expect that their counterparty may incur significant legal costs dealing with any violation of that exclusive jurisdictional promise. Those legal costs may be incurred in objecting to jurisdiction or defending the merits in the relevant foreign forum or seeking anti-suit relief in this Court - or both, either sequentially or concurrently. The foreseeability of such damage

to an innocent party reflects the fundamental importance of jurisdictional bargains and the potentially profound practical impact of their non-observance: see paragraph 9 above.

15. As already noted, whilst damages are not an *adequate* remedy they remain an *available* and *additional* remedy for breach of an exclusive jurisdictional covenant. Where the relevant loss takes the form of legal expenditure incurred in seeking anti-suit relief (or a stay of proceedings) in this Court, a claimant is deemed to be fully indemnified by an order for costs and may not seek damages to 'top up' any shortfall. The approach in such cases is, therefore, to award costs on the indemnity basis to more closely approximate to the measure of damages that would otherwise be recoverable if available. This award of costs is a proxy for the promissory interest which has been vindicated: see *Havila Krystruten AS & others v. STLC Europe Twenty Three Leasing Ltd. & others* [2023] EWHC 444 (Comm) at [80]-[84].

16. The award of indemnity costs may also be said to reflect the importance attached by our legal system to upholding jurisdictional promises (see paragraph 7 above) as well as taking account of the practical detriment suffered by a victim of jurisdictional violation (see paragraph 9 above) including the inevitable deficit between the actual amount of foreign legal costs incurred by such a party and the quantum of any damages recoverable as a matter of English contract law. The award of indemnity costs in such situations is another manifestation of the institutional values which underpin the post-*Angelic Grace* test.

17. For these reasons, I made an order that the defendant pay the claimants' costs on the indemnity basis and summarily assessed those costs at the hearing.