OUTER HOUSE, COURT OF SESSION

[2022] CSOH 57

P657/22

OPINION OF LORD BRAID

In the cause

HUGH HALL CAMPBELL QC

Petitioner

For

Interdict and interdict ad interim and an order under the Court of Session Act 1988

Petitioner: Smith QC, C Smith; Thompsons
Respondent: Lord Davidson of Glen Clova QC, A McKenzie; CMS

22 August 2022

Introduction

[1] This petition called before me on the petitioner's motion for interim interdict prohibiting James Finlay (Kenya) Limited (JFKL) (a) from continuing to prosecute ongoing proceedings which it has raised in the Employment and Labour Relations Court of Kenya and (b) from raising any new proceedings to like effect. (The type of interdict sought is commonly referred to as an anti-suit interdict, or, in other jurisdictions, as an anti-suit injunction). An order is also sought under section 46 of the Court of Session Act 1988 ordaining JFKL to apply to the Kenyan court as soon as practicably possible to recall or negate the effect of interim orders already granted on 28 July 2022. JFKL accepts in principle that if interim interdict is granted, an order under section 46 would also be appropriate,

since otherwise the interdict would have no practical effect. The unusual - although not unique – feature of this case is that the proceedings which it is sought to interdict, and to have JFKL discontinue, are themselves anti-suit proceedings, which are intended to, and do, have the effect of preventing the petitioner from continuing to pursue group proceedings which are currently under way in this court in which he is the representative party.

[2] The test for granting interim interdict is, first, whether the petitioner has pled a *prima facie* case and, if so, second, whether the balance of convenience favours him. I address both issues below but first it is necessary to say something of the parties and the background.

The parties

[3] The petitioner is the representative party for some 1,044 Kenyan nationals who are the group members in group proceedings against JFKL, in which it is claimed that they have suffered loss, injury and damage through JFKL's fault, negligence and breach of contract. It should be noted that some of the group members continue to be employed by JFKL but many of them are no longer employed there. The petitioner avers that he has an obligation to take reasonable steps to ensure that the proceedings take place in a proper fashion to advance the interests of the group members individually and as a group. The respondent, JFKL, is a major producer and supplier of tea globally, employing some 9,500 people, many of whom live on JFKL's estates in Kenya. It has its registered office in Scotland and is therefore domiciled here.

Technical Issue

[4] I will begin by disposing of a technical issue raised, albeit not vigorously pursued, by senior counsel for JFKL. He submitted that the present petition was arguably a group

proceeding in terms of section 20 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The petitioner, although the representative party in the on-going group proceedings referred to in para [3], did not have the permission of the court to bring the present petition, in terms of section 20(5). This could perhaps be cured were the petitioner to move for permission, which would not be opposed, although a further difficulty might then be that the Rules of Court provided that group proceedings must be raised by way of summons. Senior counsel for the petitioner did not take up the invitation to move for permission, instead submitting simply that the petitioner clearly had standing to bring the present petition.

[5] I do not agree that the issue raised by the present petition is one which is, or ever would be, suitable for a group proceeding. The process is not one which might involve two or more persons each of whom has a separate claim (see section 20(2)). Rather, the petitioner asserts that proceedings raised in Kenya have the effect of restraining proceedings in Scotland which he does have permission to pursue. The petitioner was named as an interested party in the Kenyan proceedings. The real question is whether he has title and interest to bring the present petition, and I am satisfied that he does, given that he is charged with the responsibility of pursuing the group litigation on behalf of the group members and the proceedings in Kenya prevent him from doing just that. Accordingly, section 20 of the 2018 Act has no application and the petitioner does not require permission.

Background

The group proceedings

[6] The group proceedings are being actively defended, on their merits, by JFKL. The first point to make about that litigation, relevant to the raising of anti-suit proceedings in

Kenya in July 2022 when the Scottish proceedings were well under way, is that JFKL has been aware since no later than the autumn of 2021, from pre-action correspondence, that group litigation in Scotland was proposed. After sundry other procedure, a hearing took place on 16 February 2022 to determine whether or not permission for the group proceedings ought to be granted. JFKL opposed the granting of permission. At that stage it did not argue that the Court of Session did not have jurisdiction to entertain the group proceedings although it did advance one proposed defence of *forum non conveniens*. The Lord Ordinary, having heard from both parties, granted permission for the proceedings to commence and fixed a timetable for the progress of the action. In accordance with the Rules of Court, the Lord Ordinary determined the issue as being claims in respect of musculoskeletal injury arising from common conditions of employment engaged in harvesting tea on estates owned and/or operated by JFKL in Kenya. Although JFKL subsequently reclaimed (appealed) that order to the Inner House, it did not appeal on the ground that the court did not have jurisdiction over JFKL. Rather, its appeal was directed towards whether there was a single issue which could properly be the subject of group proceedings. The appeal was refused by the Inner House, which re-set the timetable fixed by the Lord Ordinary (in light of the delay caused by the appeal). Subsequently, defences were timeously lodged by JFKL

[7] One requirement of group proceedings is that the names of those individuals who wish to join in the proceedings, and to make a claim, are recorded on a group register, which requires to be lodged with the court and to be updated from time to time. Such a register has been made up and lodged in process. It is a court document.

[8] In its defences to the group proceedings, JFKL (for the first time) introduced a plea that this court has no jurisdiction to hear the group proceedings. The jurisdiction which this

court would otherwise have by virtue of JFKL's domicile is said to have been ousted by the Kenyan Work Injury Benefits Act 2007 (WIBA). (In the Kenyan proceedings, although not yet in the defences, it is argued that jurisdiction is also ousted by a collective agreement prorogating jurisdiction to the Kenyan Employment and Relations Court.) Catering for the possibility that the court finds that it does have jurisdiction, JFKL also has a plea of *forum non conveniens*. That plea is to the effect that having regard, among other things, to the fact that the group members all reside in Kenya and that the tea estates are there, the natural forum for the litigation is Kenya. The defences contain full averments in support of both pleas, which have yet to be considered and determined by this court. For that matter, the petitioner has not yet had the opportunity to answer the defences. The petitioner has however lodged, in this process, an opinion from Dr Willy Mutunga (a former Chief Justice/President of the Supreme Court of Kenya) to the effect that neither the WIBA nor other legislation founded on by JFKL in its anti-suit proceedings has the effect contended for by JFKL of ousting the jurisdiction of the Scottish courts. (For the avoidance of doubt, JFKL has its own expert opinion in support of its contrary position.)

The sheriff court actions

[9] Also relevant are seven other actions, also in respect of musculoskeletal injuries, previously raised against JFKL in the All-Scotland Personal Injury Court at Edinburgh, which are presently sisted. It appears that no plea was taken as to the court's jurisdiction in those actions. In one action, an order was granted for inspection of JFKL's premises by an ergonomics consultant. I revert to this below.

The first interdict

[10] After the order of 16 February 2022 but before the reclaiming motion had been heard, the petitioner avers that his representatives became aware that JFKL had caused, permitted or instructed a number of its managers to engage in behaviour calculated to intimidate and threaten group members. The then group representative lodged a petition seeking interim interdict against such behaviour. It was averred in that petition, among other things, that specific threats had been made to named workers that once the details of those seeking compensation who were still working for JFKL were known, the employment of those persons would be terminated. The petition also contained averments of other behaviour calculated to intimidate or harass the group members (such as placing unreasonable work demands on them). Affidavits were lodged in support of those averments. Interim interdict in the terms sought was granted *ex parte* on 8 April 2022.

[11] That petition was opposed by JFKL. In its answers, it denied the allegations of intimidating and threatening behaviour. Following sundry procedure, including the allowance of a proof, and following an assertion by JFKL that the order granted was too wide, the petition was sisted on 13 July 2022 on the basis of an undertaking granted by JFKL in substantially the same terms as the interim interdict. One subtle difference between the interdict and the undertaking was that JFKL undertook not to act in any manner *not in accordance with due process in the court of either Scotland or Kenya* that was calculated to cause fear, alarm or distress to those employees and former employees of the respondent as named on the group register with the intention of dissuading those employees or former employees from continuing with litigation against JFKL in Scotland (the italicised words are those which did not appear in the interdict and were added at JFKL's instance). The petitioner avers that at no time did JFKL's legal advisers produce evidence to contradict the

petitioner's claims of harassment and intimidation. Additionally, JFKL agreed to meet the expenses of the petition to date, which the petitioner maintains is a clear indication that it was accepted by JFKL that the petition was justified.

The Kenyan anti-suit injunction

[12] On 28 July 2022, JFKL applied for and was granted an interim injunction in the Employment and Labour Relations Court of Kenya. No advance notice was given to the petitioner or to those representing the group. In support of its application, JFKL lodged an affidavit by its managing director, Simon Hutchinson. In summary, the interim orders prohibited the group members (a) from prosecuting or proceeding in any manner with the group proceedings and (b) from initiating any further actions with regard to any work injury claims arising in Kenya, pending the hearing of the Kenyan application. A direction was also issued that the application be posted on JFKL's notice boards within its premises. A further direction was issued that the application be placed before the Duty Judge on 25 August 2022 for further directions on disposal. I am told that no substantive decision on the application would be reached on that date but that, if opposed, a final hearing could be expected in October or November 2022. (In any event, for what it is worth, JFKL has undertaken, in light of this petition, to have that date deferred by two weeks if possible).

[13] Although, as such injunctions must be, the orders granted by the Kenyan court are directed against the group members, rather than this court, and although the present petitioner was named only as an interested party, not as a respondent, the effect of the orders is that the group proceedings cannot be progressed for so long as the orders remain in force. That has the effect that this court is presently unable even to consider the pleas of no jurisdiction and *forum non conveniens* which have been advanced in the group

proceedings. Were a final injunction to be granted, that would have the practical effect that a foreign court would have decided conclusively that this court did not have jurisdiction to hear claims of which it is currently seised, and of bringing the group proceedings to an end.

The law

[14] It is well established that a Scottish court has the power at common law to interdict foreign proceedings: see, eg, *Young* v *Barclay* (1846) 8D 774; *California Redwood Company in Liquidation* v *The Merchant Banking Company of London* (1886) 13R 1202; *Pacific Coast Mining Co* v *Walker* (1886) 13R 816; Anton, *Private International Law 3rd Edn*. 8.425-8.439. The power should be exercised with caution: *Young* v *Barclay*. Anton, at 8.426, refers to the distinction between cases where both countries concerned could have jurisdiction to decide the case (alternative forum cases) and cases where only the other country has jurisdiction (single forum cases). In alternative forum cases, the power to grant an anti-suit injunction or interdict may be exercised where the pursuit of the relevant proceedings is vexatious or oppressive; in single forum cases, the bar is higher, since to prevent proceedings in the sole country which has jurisdiction would inevitably lead to injustice, but even in such cases, it is said that an anti-suit injunction may be granted to prevent unconscionable conduct.

[15] Anti-suit interdicts or injunctions have been granted in a variety of circumstances. In some cases, proceedings have already been commenced in the foreign jurisdiction; in others, not. One category of case (such as *California Redwood)* is where a bankrupt estate is being administered in this country and an interdict is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of foreign assets; in such cases, the purpose of the interdict may be said to protect the jurisdiction of the court here.

[16] Although the petitioner's position is that the present case is an alternative forum case, it should be noted that in many such cases, the pursuer/plaintiff/applicant has raised two sets of proceedings, one in each jurisdiction, and the issue in those cases is whether one set of proceedings should be prevented from progressing further, in order that the other court may determine the case. That is not the factual situation here, since there currently are no proceedings against JFKL in Kenya. Rather, JFKL's position before the Kenyan courts (and here) is that this is a single forum case, that forum being Kenya. It is on that basis that the Kenyan anti-suit order was obtained.

[17] Here, the parties accept that the principles applicable to a case such as the present (where proceedings have been commenced in another country which have the effect of interfering with on-going proceedings in this jurisdiction) are set out in *Turner* v *Grovit* 2001 WL 1479757 in the speech of Lord Hobhouse of Woodborough. The facts of that case, stated briefly, were that employment tribunal proceedings for unfair/wrongful dismissal were under way in England at Mr Turner's instance, when his employers raised proceedings against him in Madrid seeking damages of a much larger amount than he was claiming. The Court of Appeal found as a fact that the Madrid proceedings were launched in bad faith "in order to vex" Mr Turner in the pursuit of his employment tribunal claim. The English common law was considered by Lord Hobhouse. After stressing that the term "anti-suit injunction" is something of a misnomer, since it is directed not at the foreign court, but at the wrongful conduct of the party to be restrained, and after discussing the circumstances in which such injunctions may or may not be granted, Lord Hobhouse summarised the essential features which made it proper for an anti-suit injunction to be granted:

a) The applicant is party to existing legal proceedings in this country;

b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country;

c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the domestic proceeding to grant the applicant a restraining order against the defendants.

[18] Two further points made in *Turner* are worthy of mention. First, a contractual exclusive jurisdiction clause will give a party a right not to be sued in a particular jurisdiction (paragraph 25). Second, at least in our law, the question of whether a foreign court has jurisdiction and if so whether to exercise that jurisdiction are questions which fall to be decided by the foreign court itself (paragraph 26).

[19] In summary - and I do not believe this is a matter of contention between the parties - the proceedings in Kenya may be restrained only if JFKL's conduct in raising them was unconscionable, vexatious or oppressive, it not being argued before me that for present purposes there was any material difference in those concepts (but see, for completeness, *FMC Corporation* v *Russell* 1999 SLT 99, Lord Bonomy at 101, where he drew a distinction between conduct which was vexatious and that which was oppressive).

[20] The first question for determination at this stage then becomes: has the petitioner pled a *prima facie* case of unconscionable, vexatious or oppressive conduct by JFKL?

Pleadings of unconscionable, vexatious or oppressive conduct

[21] The petitioner prays in aid a number of factors in support of its case that JFKL's conduct in seeking and obtaining the Kenyan orders was vexatious and oppressive of the group members, whom it was calculated to harass. (The petitioner also avers that JFKL has

breached its undertaking in the interdict petition, and amounts to an abuse of process here, but those are perhaps matters for another day.) The factors relied on are as follows.

Delay in bringing the Kenyan proceedings

[22] As is apparent from the above account of the history of the group proceedings, JFKL has known of their existence for many months; indeed, it has known of the threat to raise such proceedings since late 2021. Not only did it delay in seeking an anti-suit injunction, it actively engaged in, and opposed, the group proceedings, only turning to the Kenyan courts when it was achieving a lack of success before the Scottish courts. JFKL admits the delay, under explanation that if it had been successful in opposing the allowance of group proceedings there would have been no need for it to obtain the orders in Kenya that it did. However, that does not address the points (a) that it knew that it was unsuccessful in opposing the allowance of the group proceedings in February 2022 but did not seek the anti-suit injunction until more than five months later and (b) that the no-jurisdiction plea was not taken in the Scottish proceedings until defences were lodged in June 2022. If it had wished to argue a lack of jurisdiction, it had every opportunity to do so but did not avail itself of that opportunity.

Continuation of a campaign of frustration of legitimate court orders

[23] The petitioner avers that JFKL has evinced a determination to stop any Scottish court inquiring into its practices at its estates in Kenya. By way of example, the petitioner refers to the sheriff court order referred to above for inspection of JFKL's premises by an ergonomics consultant. That order (the making of which JFKL did not oppose) has not yet been implemented, because JFKL obtained an injunction from the Kenyan Courts. JFKL's answer

is to say that the purpose of the Kenyan application was to ensure that the inspection was carried out in accordance with Kenyan law, and that the Kenyan Court of Appeal merely decided that the inspection could not be carried out without intervention by Kenyan authorities. An appeal was made by the workers to the Kenyan Supreme Court on 16 June 2022. Counsel for the petitioner told me that he had observed part of the appeal proceedings on-line and that the argument presented by the advocate for JFKL was largely based on the allegation that the sheriff court had adopted a colonialist attitude, rather than an argument peppered with hard law, as he put it. Wherever the truth of this matter lies, the incontrovertible fact remains that the decision of the Supreme Court of Kenya is awaited, and that an order which was granted some considerable time ago remains unimplemented because of JFKL's opposition to it in Kenya.

Misrepresentation in the Application in the Kenyan petition

[24] The petitioner maintains that JFKL failed in its duty of full and frank disclosure to the Kenyan court in a number of respects.

Failure to disclose the reason why the interim orders were granted

[25] It is now common ground that although the petition and the interlocutor granting interim interdict were produced to the Kenyan court, the affidavits, which supported the petitioner's claims that JFKL had been engaging in systematic intimidating and threatening conduct, and destroying evidence, were not produced. Likewise, JFKL failed to disclose that it had failed to seek to recall or vary the interim interdict (which it asserted in the application was too wide) or that it had agreed to pay the expenses of the petition (generally an indication of an acceptance that the proceedings were justified).

[26] Although the undertaking was referred to, the application did not state that it was in substantially the same terms as the interim interdict had been. Reference was however made to the words added to the undertaking, referred to in paragraph [11] above, insofar as the application stated that it allowed JFKL to take "lawful, legal actions or steps in accordance with due process available in the courts of either Scotland or Kenya". Although the petitioner did not take this point, I observe that that was not how the undertaking had been worded, in that the words "lawful, legal actions or steps" did not feature in it: had they been, the petitioner might have realised the purpose of the insertion and been alerted to JFKL's intention to raise anti-suit proceedings in Kenya. On any view, however, the wording of the application contained a gloss on the wording of the undertaking which it was unnecessary to add, and one wonders why that was done. (As a further aside, when that paragraph of the undertaking is read again, in the cold light of day, it does appear to have the express aim of permitting JFKL to act in a manner which *is* calculated to cause fear, alarm or distress to those on the group register with the intention of dissuading them from continuing with the group litigation, provided it does so in accordance with due process of, reading short, the court in Kenya; which of course, is precisely what the petitioner avers was the purpose of the Kenyan anti-suit injunction).

Misrepresentations in the affidavit evidence presented to the Kenyan Court

[27] In Mr Hutchinson's affidavit lodged in support of the Kenyan application it was asserted that the "Scottish Court issued a further interim ex parte injunctive order barring [JFKL] from disciplining or terminating the services of any of JFKL's employees". As the petitioner asserts, that statement was patently untrue and was calculated to represent that the Scottish courts had been unfairly interfering in due processes in Kenya. As has been

seen, the interdict was in truth against intimidation and threatening group members with loss of employment because they were joining or had joined the group proceedings. The affidavit was also misleading (or at least, incomplete) in other respects. In stating that the interim interdict had been granted *ex parte* at a hearing at which JFKL was not represented, it failed to mention that JFKL had subsequently lodged answers to the petition and had the opportunity (which it did not take) to seek recall or variation if it considered the interdict to be too wide. It failed to mention, as did the application, that JFKL had agreed to pay the expenses of the application. On one reading, the affidavit gave the impression (at paragraph 13) that the Scottish court had already decided issues of jurisdiction and *forum non conveniens*. It also gave the impression (at paragraph 22) that the Scottish court might make orders which might affect legal and industrial relations situation in Kenya. JFKL points out that copies of the interim interdict and of the undertaking were attached to the affidavit, which is true. Nonetheless there was some force to the submission of counsel for the petitioner that in a busy court, discrepancies between the fine detail of productions or exhibits and the statements in the affidavit might not readily be identified; and in any event, that does not excuse the erroneous or misleading statements in the affidavit.

The basis for the petition in Kenya

[28] Aside from misrepresentation of the facts in the Kenyan application, the petitioner avers that it is punctuated by irrelevant and legally incorrect representations, chiefly that the group members are obliged to sue (by statute and by constitution) in Kenya. However, under reference to the opinion from Dr Mutunga, referred to above, those arguments are said to be ill-founded in Kenyan law. JFKL also asserted to the Kenyan court that it would be required to transfer data on its employees to foreign representatives of JFKL and to the

Scottish court, without mentioning that the subject of the data can consent to its release under Kenyan law or that the Scottish courts can cater for such matters by use of confidential envelopes. JFKL denies those averments. It has its own expert opinion, from Professor Githu Muigai, to the effect that the group members are obliged to sue in Kenya. Which opinion is to be preferred is not a matter for me to rule upon at this stage, but I do note, for what it is worth, that the petitioner has an evidential basis for its averments.

Continued harassment of employees

[29] The petitioner avers that in addition to the complaints of harassment in the interdict petition, another employee, Mr Epari, was subjected to continued harassment and intimidation at around the time the interdict was granted. On 31 March 2022 he is said to have received a letter from JFKL dismissing him from his employment because he had initiated an action against it. When he took issue with this, his employment was reinstated but he was asked to return the letter, which he said he had lost. His home was subsequently broken into and the letter (but nothing else) was stolen. This is vigorously denied by JFKL. Again, I cannot decide at this stage where the truth lies. Affidavits vouching both claim and counterclaim have been lodged.

[30] In addition to the averments in the petition, counsel for the petitioner asserted *ex parte* that as recently as 17 August 2022, another group member, a Ms Mogendi, had felt intimidated when visiting a medical centre owned and run by JFKL, for a pre-booked appointment seeking examination of on-going back pains. The doctor unnecessarily referred to the fact that she was a group member, and that she would never be paid. JFKL has not yet had the opportunity to investigate this allegation.

Use of the Group Register as a means of harassment

[31] The petitioner avers that the orders obtained in the Kenyan proceedings have enabled JFKL to use information on the group register for a wholly illegitimate and unnecessary purpose. It has listed the names on the register (under the guise of intimating the proceedings to the group members) in an advertisement in a national newspaper and has posted the names of all group members on various notice boards within JFKL's premises. This is said to constitute unfair processing of data, which has caused distress and worry to the individuals on the notices. Under reference to *Duff & Phelps, Minuter* 2022 SLT 450 and *Iomega Corp* v *Myrica (UK) Ltd* 1998 SC 636, counsel for the petitioner submitted that the register, being a document in process, was under the control and supervision of the court and could not be used for another purpose, as it had been here, without the court's permission.

[32] Counsel for JFKL acknowledged that this court's permission ought to have been obtained before the information on the register was used, and apologised for that omission. (I observe that if permission had been sought, that would have entailed notice being given of the Kenyan proceedings, and I am unwilling at this stage to attribute the non-seeking of permission to mere oversight or inadvertence.) Beyond that, JFKL's position is that publication of the names was made pursuant to the order of the Kenyan court and that service on the individuals concerned could not have been avoided under Kenyan procedure. Two points may be made about that. First, as the petitioner points out, JFKL's solicitors could have asked the petitioner's solicitors if they would accept service of the Kenyan proceedings, or could simply have served the application on the petitioner alone. Second, it is unclear why an order was requested that *all* names be published on JFKL's notice boards when it is accepted by JFKL that many of the group members are no longer employed by it.

[33] Before leaving the notice boards, this is a convenient point at which to note that when the petition first called before me on 15 August 2022, various undertakings were given (by both parties) pending a full hearing of the motion for interim orders on 19 August 2022. One of those undertakings was that JFKL forthwith remove all the notices from the notice boards. It is now accepted by JFKL that it failed to implement that undertaking, in that some notices were not removed. Counsel for JFKL also tendered JFKL's apologies to the court for this failure, which he ascribed to inadvertence. That may be so, although it may betray a somewhat casual approach by JFKL to the need to comply to the letter with orders of this court or undertakings given to it. Be that as it may, I accept that this does not go to the heart of the issue currently before this court, although it may well be another question for another day should the petitioner elect to take the matter further.

[34] The petitioner also avers that the publication of the names of the group members has endangered their wellbeing and safety. The group members are not members of the Kalenjin tribe, which controls the area where JFKL's tea plantation is located. The consequence of publication of the names of the group members is that they are now all easily and readily identifiable as potentially posing a threat to the prosperity of the Kalenjin tribe and it is said that there is a considerable risk that they will be targeted either to seek retribution or to act as a deterrence to further claims being initiated in the Scottish court. The foregoing is denied by JFKL.

Other proceedings

[35] For completeness, I mention that the petitioner further asserts that JFKL has previously sought to (mis)use the Kenyan Courts as a means of targeting workers who have attempted to assert and vindicate their rights against it. However, that appears unrelated to

the group litigation and I have left those averments out of account in deciding whether or not a *prima facie* case has been pled, since they are of dubious relevance.

Submissions for the petitioner

[36] Counsel for the petitioner submitted that JFKL's conduct in raising the anti-suit injunction was, in the circumstances just set out, oppressive, vexatious and unconscionable. It was clearly another step designed to intimidate group members, and to inhibit them from continuing with the group litigation. It was impracticable for all 1,044 respondents to oppose the Kenyan injunction. Taking instructions would be well-nigh impossible, and it was unclear how the cost of opposition would be funded. The test laid down in *Turner* was met. At the time of giving its undertaking in the interdict process, JFKL evidently had the intention of bringing the anti-suit proceedings as was now plain from insertion of the reference to due process. The Kenyan proceedings, as had the Madrid proceedings in *Turner*, been raised in bad faith for the sole purpose of obstructing the on-going proceedings. It was necessary to grant the order sought in order to protect the legitimate interest of the petitioner (and of the group members) that the group proceedings continue. Group procedure did not exist, nor would funding be available, in Kenya. A strong *prima facie* case had been made out.

[37] As far as balance of convenience was concerned, this favoured the petitioner. The reality was that if the group proceedings were not allowed to continue, litigation in Kenya would not be possible. The group members would suffer grave prejudice if unable to continue the Scottish litigation. There was no prejudice to JFKL. It was well able to advance its arguments about jurisdiction in the group proceedings. If those arguments were sound, that would be an end to the group litigation.

Submissions for the respondent

[38] Counsel for the respondent submitted that the petitioner had but a weak *prima facie* case. The central contention of the petitioner – that Scotland's legal system was superior to that of Kenya – was unsound. The essence of the petitioner's case had to be that whereas the natural home of the litigation was Kenya – since the substantive case in the group proceedings was based wholly on Kenyan law, the group members were all Kenyan and the witnesses would primarily be Kenyan – nonetheless JFKL's position in respect of the claims being litigated in Kenya was unconscionable, vexatious and oppressive. There was no reason to suppose that the Kenyan courts would not give proper consideration to the group members' claim that the Kenyan courts did not have exclusive jurisdiction or that Scotland was the appropriate forum. It was far more desirable that the Kenyan court give a definitive ruling on a question of Kenyan law, than that the Scottish court should attempt to reach a non-definitive ruling on the basis of competing expert evidence as to what Kenyan law was. As paragraph 25 of *Turner* made clear, one situation where an anti-suit injunction would be granted was where an exclusive jurisdiction clause granted jurisdiction on another court: that was JFKL's contention here. Further, group proceedings and legal aid are both available in Kenya.

[39] As regards balance of convenience, taking into account the weakness of the *prima facie* case, it favoured the respondent. Were interim interdict pronounced, the court would lose the benefit of the Kenyan court's views on matters of Kenyan law. There was no urgency in the Scottish proceedings being allowed to continue at this time. Claims would not prescribe as new group members could enter the proceedings. The pleas of no

jurisdiction and *forum non conveniens* would in any event have to be considered before the court could begin addressing the merits. Interim interdict should be refused *in hoc statu.*

Decision

Prima facie case

[40] To dispose first of the submission for JFKL as to the petitioner's so-called central contention, the petitioner's argument is not founded on a contention, nor do I proceed on what would in any event be an unwarranted basis, that Scotland's legal system is superior in some way to that of Kenya. Further, counsel for the petitioner expressly disavowed any suggestion that the Kenyan courts would not approach the anti-suit injunction in a proper manner. As the above narration of the factors relied upon by the petitioner makes clear, the petitioner's criticisms are entirely directed at JFKL. Essentially, the petitioner's case as to why continuation of the Kenyan proceedings would be oppressive is as follows: first, that in making the orders which it did, the Kenyan court was, in effect, led up the garden path by JFKL; second, that although the orders (for example, as to intimation of the names) were lawfully granted by the Kenyan court, JFKL had an ulterior motive in obtaining those orders, namely to harass and intimidate the group members, against a background of alleged intimidation and harassment designed to dissuade group members or prospective group members from participating in the group litigation; and further, that JFKL misused information on the group register to achieve that goal; and third, that for the Kenyan court to do justice to the arguments before it, the proceedings would require to be opposed in a meaningful sense which is unlikely to be possible due to practical difficulties in obtaining instructions and funding.

[41] As I have noted, counsel for JFKL also submitted that the petitioner's case was that it is oppressive that the substantive claims be litigated in Kenya. That is not the petitioner's case. The petitioner accepts that JFKL has the right to argue that the claims should be litigated in Kenya; what the petitioner claims is oppressive is JFKL's conduct in raising the jurisdictional issue and attempting to have it decided there, rather than in the Court of Session where the only substantive actions currently in existence are on-going.

[42] Turning, then, to what the petitioner's case is, his averments of oppressive conduct rely, in particular, on:

- the delay in raising the Kenyan proceedings;
- the alleged history of intimidation;
- the repeated attempts to thwart orders of the Scottish courts;
- the revision of the undertaking, which clearly shows that the anti-suit injunction was in contemplation at that point;
- misuse of the group register;
- the selective and in some respects misleading information which was provided to the Kenyan court.

If proved, these averments are easily capable of founding the inference that JFKL's conduct in raising the Kenyan proceedings was vexatious, oppressive and unconscionable. I consider that the petitioner has made out a strong *prima facie* case.

Balance of convenience

[43] Turning to consider the balance of convenience, the group proceedings cannot continue for so long as the Kenyan anti-suit injunction remains in place. That in itself will cause prejudice to the group members. To quote the oft-used phrase: justice delayed is

justice denied. If the Scottish proceedings are allowed to resume, the next stage is that a preliminary hearing will be heard at which the court will regulate future procedure. Given the pleas of no jurisdiction and *forum non conveniens*, and without pre-empting what the Lord Ordinary may or may not do, that procedure is likely to entail either a debate or a preliminary proof to dispose of those pleas. There is no discernible prejudice to JFKL, a Scottish company which has already engaged Scottish lawyers, in being required to present its arguments on jurisdiction to the Scottish court. It is able to afford to do so. It has already obtained an opinion as to the applicable Kenyan law. Conversely, there is at the very least a serious doubt as to whether the group members would be able to bring substantive damages claims in Kenya. There are also likely to be serious practical difficulties in their giving instructions for opposition to the anti-suit injunction, and in obtaining funding to do so. Even if those difficulties can be overcome it is likely to take some time for the legal representatives acting in Kenya to obtain 1,044 sets of instructions. That in itself may well lead to a delay in the Kenyan anti-suit proceedings being concluded.

[44] For all of these reasons, and also taking into account the strength of the *prima facie* case, I consider that the balance of convenience clearly favours the petitioner.

[45] There is one final matter. The argument for JFKL that the Kenyan courts are best placed to decide whether Kenya has exclusive jurisdiction is superficially seductive. However, I consider it to be undermined by what I take to be a general acceptance that it is for the courts of the place where an action has been brought, in this case the Court of Session, to decide whether it has jurisdiction (in this case, over a company, be it remembered, which is domiciled in Scotland), not for a foreign court to determine that issue: *cf Turner,* above, at para [26]. The point being made there of course was that it was not for

an English court to determine the jurisdiction of a Madrid court but the observation of Lord Hobhouse is of general application:

> "For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws…Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction."

It seems to me that the obverse also applies, namely, that this court has an interest in protecting its own jurisdiction (a theme which emerges from the case law: see para [15]). Counsel for JFKL acknowledged that it would at the very least be unusual for a foreign court to decide the issue of whether a Scottish court has jurisdiction. This is a further factor pointing towards the grant of interim interdict.

Disposal

[46] Having reached the view that the petitioner has a strong *prima facie* case, and that the balance of convenience favours him, it follows that interim orders and an order under section 46 of the Court of Session Act 1988 are appropriate. As requested by counsel, I will put the case out by order to discuss the precise terms of the orders to be made.