

Conditional anti-suit injunction granted where existence of contract with London arbitration clause in dispute

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Times Trading Corp v National Bank of Fujairah (Dubai Branch)

A person who brings a claim abroad in flagrant breach of an arbitration or jurisdiction agreement will be subject to an anti-suit injunction almost automatically (*The Angelic Grace* [1995] 1 Lloyd's Rep 87). Should this approach be applied if the existence of the direct contract between the two parties is in dispute? Mrs Justice Cockerill held, somewhat creatively, that the test in *The Angelic Grace* applied by analogy, such that an (albeit conditional) anti-suit injunction should be granted.

What are the implications of this case?

Cockerill J granted an anti-suit injunction to the claimant ("Times") despite the fact that the existence of the contract which contained the arbitration agreement was in dispute. The case did not fit either of the paradigm quasi-contractual categories for the grant of an anti-suit injunction but the Judge applied *The Angelic Grace* test by analogy. Adopting a principled approach, Cockerill J found that the core principle underpinning the granting of quasi-contractual anti-suit injunctions in earlier authorities – that a party may not claim under a substantive contract without also assuming the burden of that contract – equally applied here. As the defendant ("NBF") had asserted the existence of a contract in Singapore, NBF should be required to bring a claim consistent with that contract, even if the existence of that contract was in dispute.

Cockerill J's judgment contains a clear examination of the different categories of application for anti-suit injunctions and the applicable rules and principles. Of most interest, however, is the creativity shown by Cockerill J, which finds expression in two facets of the Judgment.

First, reliance on broad underlying principle to extend by analogy the ambit of quasi-contractual anti-suit injunctions to situations which do not fall neatly within specific existing categories. Practitioners should note that the fact that a client's case does not fit neatly within well-established existing categories should not, without more, be a reason not to apply for an anti-suit injunction.

Second, by making the grant of the anti-suit injunction subject to a (rigorous) condition, the Judgment demonstrates the flexibility of the tools the Court can employ in this context. In future, if there is an element which may militate against the grant of an injunction, it may pay to temper an application (perhaps by proactively suggesting that the grant of the injunction be made subject to a condition) to increase the likelihood of an injunction being granted.

Background

Times applied for an interim anti-suit injunction in the High Court in London restraining NBF from prosecuting or continuing proceedings which it had commenced against Times in the High Court of Singapore, alleging that the Singapore proceedings had been commenced in breach of NBF's contractual obligation to arbitrate in London.

The case concerned a cargo of coal carried on the MV "Archangelos Gabriel", a vessel owned by Rosalind Maritime LLC ("Rosalind"). The cargo was delivered without production of the bills of lading, which were held by NBF, the bank financing the purchase. It was common ground that the bills of lading (i) contained a 12 month time bar applicable to misdelivery claims pursuant to a General Paramount Clause, and (ii) incorporated an arbitration clause requiring disputes to be submitted to London arbitration.

NBF asserted a claim for misdelivery against the carrier and addressed the claim to Rosalind ("c/o Times Navigation Inc") as registered owners of the vessel in December 2018. Rosalind's solicitors replied, indicating that they acted for the owners and took no issue with the addressing of the claim. NBF issued in rem proceedings in Singapore in January 2019 and served them 10 months later. NBF also issued arbitration proceedings in London against Rosalind just before the expiry of the time bar.

After expiry of the time bar, however, Rosalind alleged the existence of a bareboat charter between Rosalind and Times, making Times the correct counterparty to NBF's claim as the bills of lading were charterers' bills. Rosalind challenged the validity of the notice of arbitration because it had purported to commence an arbitration against the wrong party. NBF therefore joined Times to the Singapore proceedings and applied to add them as a respondent to the London arbitration. Times, confident that it could resist any attempt to join them to the London arbitration, brought the application for an anti-suit injunction to prevent continuation of the Singapore proceedings against it, relying on the arbitration clause.

What did the court decide?

The application had been brought and argued on the basis that this was or should be treated as a contractual anti-suit injunction. The difficulty, however, was that NBF submitted that there was an issue as to who was the carrier and in those circumstances the Court could not be satisfied that there was an arbitration clause between NBF and Times.

NBF's position took the discussion into what the Judge referred to as "a juridically fascinating area" (§44) namely the "quasi-contractual anti-suit injunction". These are injunctions where the injunction defendant may not formally be bound by a forum clause but is nevertheless required to comply with the effect of the clause "as if" the injunction was contractual. An injunction can be granted in such cases without proof to the requisite standard of an arbitration clause between the parties.

The Judge found that this case was not on all fours with any of the previous quasi-contractual cases, which could be divided into two categories: (i) "quasi-contractual/derived rights" cases – where the existence of the contract is not in doubt, but the person who has brought proceedings which are sought to be enjoined is not a direct party to that contract (as considered in the *Jay Bola*); and (ii) "inconsistent contractual claims" cases – the *Dell/Qingdao* line of cases – where the claimant denies the very existence of the contract (or validity of the forum clause) under which he is sued but the injunction defendant seeks to make a claim under the contract while not seeking to respect the forum clause which forms part of it.

This case did not fit into either category. However, the Judge found that that both categories of case shared a common underpinning – "that it would be invidious to permit someone who is invoking a contract as the basis for its claim to do so otherwise than in accordance with the jurisdictional regime of that contract, to which they have either themselves agreed or to which they claim some right to enforce." (§73). Cases that fell within the common principle were to "be treated "as if" it were a contractual case, applying the *Angelic Grace* test by analogy" (§78).

The Judge held that this case fell within the ambit of that common principle (§75). NBF's approach was found to be "somewhat Janus-faced". NBF denied the contract, but it had also brought a claim asserting the Times demise charter in the Singapore proceedings. NBF could not have its cake and eat it.

On the basis that the contractual analysis was applicable (at least by analogy), and applying the test set out in the *Angelic Grace*, the Judge went on to consider what could constitute "strong reasons" which would lead a Court to refuse to grant an anti-suit injunction. Cockerill J held that there was insufficient material in the authorities to support the view that a time bar being missed would constitute "strong reasons" not to grant the anti-suit injunction (§93).

However, although the jurisdictional basis for the injunction were made out and there were no strong reasons not to grant the injunction, the Judge went on to identify certain relevant discretionary factors (e.g. Times' rejection of an offer to stay the Singapore proceedings, Times' unclean hands, the missing of the time bar and the delay in bringing the application). Although these were insufficient to amount to "strong reasons" which would prevent an injunction being granted, they militated against the grant of an injunction in the terms sought (§113).

Cockerill J therefore granted the injunction but held that it would only be just and convenient to do so on conditional terms. That condition was that Times was required to give an undertaking not to rely on any time bar argument in the London arbitration. Cockerill J therefore handed Times a somewhat hollow victory, as these were the same terms NBF had offered prior to Times' application.

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