Neutral Citation Number: [2024] EWHC 884 (Comm)

Case No: CL-2023-000873

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, WC4A 1NL

Date: 23 April 2024

Before :

MR JUSTICE BRIGHT

- -

Between :

The London Steam-Ship Owners' Mutual Insurance Association Ltd

Claimants

- and -

(1) Trico Maritime (Pvt) Ltd
(2) Ms L.D.P. Thisari Senanayake
(3) Mr S.D.K Prasanna
(4) Mr T.M.J.N.M. Tennakoon
(5) Ms T.N. Aluthwaththa

Defendants

- -
- -

Simon Rainey KC, Natalie Moore, Joseph Gourgey (instructed by Campbell Johnston Clark) for the Claimants
The Defendants did not appear and were not represented

Hearing dates: 12 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10:00am on 23/04/2024 by circulation to the parties' representatives by e-mail and by release to the National Archives.

....

Mr Justice Bright:

1. Introduction

1. This judgment follows the trial of this action, which was held on 12 April 2024. The Claimant ("the Club") was represented by Mr Simon Rainey KC, Ms Natalie Moore and Mr Joseph Gourgey, instructed by Campbell Johnston Clark.

2. The proceedings arise out of the sinking of the container ship the X-Press Pearl ("the Vessel") off Sri Lanka on 2 June 2021.

3. The Club is a London-based insurance company. It insured the Vessel and its owners (and various others) against Protection and Indemnity ("P&I") risks, pursuant to a contract of indemnity insurance ("the Insurance Contract").

4. The First Defendant is a Sri Lankan company. The Second to Fifth Defendants are Sri Lankan citizens. The Defendants are all parties who assert an interest in some of the cargo that was lost when the Vessel sank (collectively, "the Cargo Claimants"; individually, (1) "Trico", (2) "Ms Senanayake", (3) "Mr Prasanna", (4) "Mr Tennakoon" and (5) "Ms Aluthwaththa").

5. More directly, the proceedings arise out of legal proceedings commenced by each of the Cargo Claimants in Sri Lanka, in connection with their respective cargo claims. In the Sri Lankan proceedings, the First Defendant is represented by KP Law Associates, and the other Cargo Claimants are represented by Nirupama Rajapaksha.

6. In response, the Club commenced an arbitration claim in this jurisdiction, seeking a final antisuit injunction and declaratory relief from this court, in support (it was said) of its right to be sued only by a claim referred to arbitration in London, subject to the terms of the Insurance Contract.

2. The Cargo Claimants' decision not to engage with or take part in this action

7. The Defendants ("the Cargo Claimants") did not appear and were not represented. This cannot be because they were not aware of (a) these proceedings or (b) the fact that the trial had been listed to take place on 12 April 2024.

   (1) The Club's claim form in the proceedings before me, and its application notice seeking interim relief, were issued on 15 December 2023.

   (2) KP Law Associates wrote to the Club's English solicitors on 9 January 2024 (confirmed by an email of 10 January 2024), in connection with limitation proceedings taking place in this jurisdiction. Nirupama Rajapaksha sent a similar email to the Club's English solicitors on 11 January 2024. In each case, the letters attached referred to instructions from the Cargo Claimants. These letters and emails therefore confirmed that KP Law

Associates and Nirupama Rajapaksha were acting for the Cargo Claimants and were in communication with them.

(3) On 12 January 2024, the Club's English solicitors sent emails to KP Law Associates and to Nirupama Rajapaksha, informing them that a hearing was due to take place in this jurisdiction on 15 January 2024, seeking an interim antisuit injunction and permission to serve proceedings on the Cargo Claimants in Sri Lanka, via their Sri Lankan legal representatives.

(4) I made an order on 16 January 2024 permitting service out of the jurisdiction by courier and/or by email on the Defendant's Sri Lankan legal representatives. I did so in the light of the evidence that this would be effective at ensuring that the existence of the proceedings was brought to the Cargo Claimants' attention. I also granted the interim antisuit injunction sought by the Club, on terms that there should be a continuation hearing on 30 January 2024.

(5) Service in accordance with my order of 16 January 2024 was performed on that date, by emails sent to KP Law Associates and to Nirupama Rajapaksha, and a certificate of service was filed. The relevant documents were also sent by courier.

(6) The Club's continuation application, to be determined at the continuation hearing on 17 January 2024, was sent to KP Law Associates and to Nirupama Rajapaksha by email and sent by courier on 17 January 2024, and a certificate of service was filed.

(7) On 19 January 2024, a letter informing the Cargo Claimants as to the details of the continuation hearing and time by which skeleton arguments were to be filed was sent by email to KP Law Associates and to Nirupama Rajapaksha.

(8) On 23 January 2024, transcripts from the hearing on 15 and 16 January 2024 were sent to KP Law Associates and to Nirupama Rajapaksha by email and by courier.

(9) The Cargo Claimants did not appear at the continuation hearing on 30 January 2024. At that hearing, Henshaw, J made a continuation order providing (among other things) that the Cargo Claimants should not, until trial or further order take any steps against the Club in Sri Lanka.

(10) The Cargo Claimants did not acknowledge service within the time required by my order of 16 January 2024, as continued by Henshaw J on 30 January 2024.

(11) The Club applied for the trial of its claim for a final antisuit injunction, and for declaratory relief, to be expedited. Notice of the application was served by emails sent to KP Law Associates and to Nirupama Rajapaksha on 8 March 2024. None of the Cargo Claimants responded to the application. On 2 April 2024, Foxton J made an order that the trial take place on the first available date 7 days after the date of the order.

(12) On 2 April 2004, the Senior Listing Officer of the Commercial Court, Mr Michael Tame, sent an email to the parties, i.e. to the Club's English solicitor and to KP Law Associates and to Nirupama Rajapaksha, stating that the trial was to take place on 12 April 2024.

8. I can only conclude that the Cargo Claimants made a deliberate decision not to engage with these proceedings or take part in the trial.

3. The Cargo Claimants' proceedings in Sri Lanka

9. The Cargo Claimants have commenced proceedings in Sri Lanka against the Club and various other parties, seeking compensation for the loss of cargo as a result of the sinking of the Vessel.

10. The proceedings in question comprise: (1) Action in Personam No. CHC 01/2023 brought by the First Defendant; (2) Action in Personam No. 04/2023 brought by the Second Defendant; (3) Action in Personam No. 05/2023 brought by the Third Defendant; (4) Action in Personam No. 06/2023 brought by the Fourth Defendant; (5) Action in Personam No. 07/2023 brought by the Fifth Defendant.

11. Writs of Summons in Personam in the exercise of the Sri Lankan Court's admiralty jurisdiction were issued in respect of these five actions in May and June 2023.

12. In the Writs of Summons, the Defendants allege (among other things) that the Vessel breached "*the warranty of seaworthiness among other things and therefore is liable for the loss and damage to the cargo as bailees and/or carriers to the owners of the said cargo*". The Club and various other parties who are named as defendants in Sri Lanka (including the Vessel's registered owners and time charterer/operator) are said to be the relevant persons who are jointly and severally liable on the claim in an Action in Personam. The Club is said to be liable "*as the insurer*".

4. The basis on which the Cargo Claimants claim against the Club

13. In the trial before me, the Club called evidence from a Sri Lankan lawyer, Mr Goonetilleke, which can be summarised as follows:

(1) The actions which the Club seeks to restrain in Sri Lanka are claims for loss of or damage to goods carried in a ship which constitute maritime claims under Section 2(1)(g) of the (Sri Lankan) Admiralty Jurisdiction Act No.40 of 1983.

(2) The Cargo Claimants contend in their proceedings in Sri Lanka that all of the named defendants to those proceedings are jointly and severally liable and that the Club is liable as insurer.

(3) Sri Lankan law does not specifically provide for an independent or direct right of recovery against the insurers in respect of claims arising out of the incident involving the Vessel.

(4) The only specific right of direct action against an insurer is found in Section 106 of the Motor Traffic Act, but that is confined to motor accident claims and does not cover the claims that have been brought in Sri Lanka.

(5) In the absence of a specifically applicable local statute or common law on the matter, Mr Goonetilleke said that that *"in determining whether the Club has any liability to the [Cargo Claimants]… the Sri Lankan court would look to the terms of the insurance policy between the Club and its assured"* and that the Sri Lankan court *"would have to apply English Law which would be the law governing and construing the application of the Club's Rules in covering the liability of the Club where the Court would necessarily have to take cognizance of the 'pay to be paid' clause in Rule 3.1. of the Club's Rules."*.

14. Thus, Mr Goonetilleke's evidence is that the Cargo Claimants' proceedings in Sri Lanka are, as regards the Club, not based on an independent or direct right of recovery against the Club under Sri Lankan law. They are based solely on the fact that the Club is the insurer, hence the assertion that the Club is liable "*as the insurer*".

15. The words "*as the insurer*" are important. The Club's role "*as the insurer*" arises out of the Insurance Contract between the Club and the Vessel/its owners. This means, in turn, that it arises out of, and necessarily depends on, the terms of that contract.

16. For example: insurance contracts invariably contain conditions and exclusions, which will affect the kinds of claim that are covered; they define the period over which insurance cover is provided; and they are generally subject to a financial limit on the level of cover provided by the insurer. Liability "*as the insurer*" is and must be subject to these provisions, and any other relevant contractual provisions.

17. Mr Goonetilleke's evidence was that the Sri Lankan courts would take into account the terms of the Insurance Contract, when considering the Club's liability.

5. The terms on which the Club insured the Vessel/the shipowners

18. The Insurance Contract pursuant to which the Club insured the Vessel was one between the Club and various assureds and co-assureds (including the registered owners, EOS Ro Pte. Ltd, and the time charterers, Sea Consortium Pte. Ltd - both of whom are also named as defendants in the Sri Lankan proceedings which the Club seeks to restrain).

19. The Insurance Contract is contained in or evidenced by Certificate of Entry No. S068 0037, which provides in relevant part as follows:

"WE [i.e. the Club] CERTIFY that from Noon GMT 20th February 2021 and subject to the terms and conditions as set out below, the Rules of [the Club's] Class 5 (Protecting and Indemnity) ("the Rules") and the Articles of Association for the time being in force, we have accepted [the Vessel] for entry in [the Club's] Class 5. The cover afforded to [the Vessel] shall continue until Noon GMT 20th February 2022 unless or until the Ship is sold, lost or the cover is withdrawn or otherwise terminated in accordance with the Rules as aforesaid".

20. Pursuant to Rule 43.1 of the 2021/2022 Rules, the Insurance Contract was governed by English law.

21. Rule 43.2 provides (subject to an exception in relation to overspill claims – inapplicable in this case) that:

"… if any difference or dispute shall arise between an Assured (or any other person) and [the Club] out of or in connection with these Rules, or out of any contract between the Assured and [the Club] or as to the rights or obligations of [the Club] or the Assured thereunder, or in connection therewith, or as to any other matter whatsoever, such difference or dispute shall be referred to arbitration in London in accordance with the Arbitration Act 1996 and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Rule. …

No Assured may bring or maintain any action, suit or other legal proceedings against the Association in connection with any such difference or dispute unless he has first obtained an arbitration award in accordance with this Rule."

22. Rule 43.3 further provides:

"43.3 … Nothing in this Rule 43 including paragraph 2 or in any other Rule or otherwise shall preclude the Association from taking any legal action of whatsoever nature in any jurisdiction at its sole discretion, and subject to and/or under the law of such jurisdiction, in order to pursue or enforce any of its rights whatsoever and howsoever arising including but not limited to:

(a) Recovering Sums Due; and/or

(b) Obtaining security for Sums Due; and/or

(c) Preserving the assets of the Assured; and/or

(d) Enforcement of its rights of lien whether arising by law or under these Rules."

23. Rule 3.1 also contains a 'pay to be paid' clause in the following terms**:**

"**RULE 3 – RIGHT TO RECOVER AND SUBROGATION**

3.1 If any Assured shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds of this Class,

PROVIDED that

3.1.1 Actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Assured of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery".

24. Accordingly, under the terms of the Insurance Contract:

(1) English law applies.

(2) Any claim against the Club under the Insurance contract must be referred to arbitration in London.

(3) By contrast, the Club can take legal action in other fora, in order to pursue or enforce its rights. That includes a claim such as the arbitration claim in the action before me.

(4) It is a condition precedent to any right to recover from the Club that the assured must first have paid the full amount of its liabilities.

6. The English law principles applicable to insurers' antisuit injunctions

25. It often happens that a claimant outside England wishes to bring a claim in its own country against an indemnity insurer based in England, alleging wrongful acts by a defendant who is insured against liability by the indemnity insurer. Where the insurance contract in question is subject to English law and jurisdiction and/or London arbitration, the insurer will wish to restrain the claimant from pursuing proceedings outside England. This gives rise to the question whether the claimant can be bound by the terms of the insurance contract, even though not a party to it.

26. Because this situation has arisen with some frequency, there are several well-known decisions relevant to it, and the legal principles are well-established. It is sufficient to refer to two main authorities: the decision of the Court of Appeal in *Shipowners Mutual P&I v Containerships Denizcilik (The Yusuf Cepnioglu)* [2016] EWCA Civ 386, [2016] 1 Lloyd's Rep. 641; and the decision of Foxton J in in *QBE Europe SA NV v Generali Espana de Seguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd's Rep. 481.

27. These decisions establish that, under English law, the court's inquiry and analysis proceeds as follows:

(1) First, it is necessary to classify the right being asserted by the claimant in the foreign proceedings, by reference to English conflict of law principles: *The Yusuf Cepnioglu* per Longmore LJ at [16] and per Moore-Bick LJ [42]; *QBE Europe* per Foxton J at [23]. This

is to ascertain whether the foreign claimant is seeking to enforce a contractual obligation derived from the contract of insurance or is advancing an independent right of recovery under a local law. If the foreign claimant is in substance relying on a contractual right arising under the insurance contract, and if the insurance contract is subject to English law, then the right being asserted must also be governed by English law.

(2) If so, then the foreign claimant is treated as bound by the insurance contract, even though not a party to it. This includes the contractual provisions as to arbitration. This is on a 'benefit and burden' basis: the foreign claimant cannot enjoy the benefit of the right derived from the insurance contract, without complying with the associated obligation to pursue that right only in arbitration; it can also be explained in the basis that the obligation to arbitrate is a legal incident of the right asserted: *QBE Europe* per Foxton J at [15].

(3) If stages (1) and (2) lead to the conclusion that the claim is linked to the enforcement of the insurance contract such that the foreign claimant is bound to the observe the arbitration agreement in the insurance contract, then it is open to the insurer to apply for an antisuit injunction against the foreign claimant: *The Yusuf Cepnioglu* per Longmore LJ at [32]-[35]; *QBE Europe* per Foxton J at [16]. The court will generally grant an antisuit injunction, unless there is a good reason why it should not be granted.

7. The application of those principles in this case

28. I have already noted in section 4 of this judgment that the Cargo Claimants' claims against the Club are brought solely on the basis that it is liable "*as the insurer*". I have also noted the evidence of Mr Goonetilleke that the approach of the Sri Lankan court would be to apply English law to the claims against the Club, on the basis that the Insurance Contract is subject to English law.

29. Happily, this is also the approach that the English court would take, and it is my approach. This is because the claims being asserted in Sri Lanka against the Club are not independent of the Insurance Contract. They are claims that are founded on the existence of the Insurance Contract pursuant to which the Club is the Vessel's P&I insurer. Accordingly, whether under the 'benefit and burden' basis or on the basis that the obligation to arbitrate is a legal incident of the rights/obligations under the Insurance Contract, the Cargo Claimants are bound by the agreement to arbitrate in Rule 43.2 of the Club Rules (incorporated into the Insurance Contract by the Certificate of Entry).

30. It follows that the Club is entitled to be sued only by way of a reference to arbitration in London; and that the Club is entitled to an antisuit injunction, unless there is a good reason why it should not be granted.

8. Is there a good reason why the antisuit injunction should not be granted?

31. The Club found out about the Sri Lankan proceedings in May 2023. It received copies of the writs by mid-July 2023. In early August 2023 it entered appearances, which included applications raising preliminary objections to the claims ("Rule 63 Applications"), notably in respect of jurisdiction.

32. In the course of the hearing before me on 15-16 January 2024, I suggested that the Club should not simultaneously be (a) seeking antisuit relief in England and (b) pursuing the Rule 63 Applications in Sri Lanka. The result was that the Club undertook to withdraw its Rule 63 Applications. Motions to withdraw were duly filed on 19 January 2023. They have not yet been determined in Sri Lanka. I understand that they are currently fixed to be determined on 8 May 2024.

33. Importantly, the motions to withdraw were subject to a request that the Sri Lankan court take judicial notice of the anti-suit injunction made by this court and dismiss and/or stay the Sri Lankan proceedings pending a final order made by the English court. In other words, they made it clear that the Club contested the jurisdiction of the Sri Lankan court.

34. At the continuation hearing on 30 January 2024, Henshaw J was addressed on the question of delay. He was satisfied that, although the antisuit application could arguably have been brought sooner, the Sri Lankan proceedings had not advanced materially or at all on the merits and there could not be any reasonable perception of any material interference with the Sri Lankan court proceedings. I agree with that conclusion.

35. In short:

   (1) In the Sri Lankan proceedings, the Club has not submitted to the jurisdiction of Sri Lanka in respect of the claims brought against it.

   (2) On the contrary, it challenged jurisdiction, but not in a way that has created any material inconsistency (in the light of the motion to withdraw the Rule 63 Applications).

   (3) The Club did not delay materially in bringing its application for an antisuit injunction.

36. Against this background, and in circumstances where the Cargo Claimants decided not to appear in this court and assert the existence of a good reason not to grant the antisuit injunction sought by the Club, I do not believe there to be any such reason.

9. The 'pay to be paid' declaration

37. I have set out the terms of Rule 3.1.1 in section 5 above. Provisions like this are very familiar in the context of P&I insurance contracts and are usually referred to as 'pay to be paid' clauses. Their validity, meaning and effect have been settled law for many years, in particular following the decision of the House of Lords in *Firma C-Trade S.A. v Newcastle*

Protection and Indemnity Association (The "Fanti" and The "Padre Island") [1991] 2 AC 1.

38. 'Pay to be paid' provisions effectively prevent direct claims by third parties against P&I insurers. This is because, as the House of Lords held in *The "Fanti" and The "Padre Island"*, their ordinary and natural construction means that the assured members are not entitled to be indemnified by the club unless and until the members have themselves first discharged liabilities in respect of which they sought an indemnity from the club: per Lord Brandon of Oakbrook at p. 27F-G; p. 28E; 29F-G. Since a third party must not be put in a better position as against the insurer than that of the assured itself, an insurer with a good defence against the original assured has the same good defence where the claim is advanced by a third party: per Lord Brandon at pp. 29F-30B.

39. Rule 3.1.1 was considered directly in *London Steam-Ship Owners' Mutual Insurance Associated Ltd v Spain* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep. 309, where Hamblen J held as follows (at [39]): "*[a]s a matter of English law, it is well established that this clause operates as a complete defence to a claim if the liability in question has not been discharged by the insured member, since such discharge is a condition precedent to the insured member being indemnified by the Club.*"

40. In the light of the claims asserted by the Cargo Claimants, it will clearly serve a useful purpose if I grant declaratory relief that makes it plain what the effect of Rule 3.1.1 is as between the Club and the Cargo Claimants. I have to proceed on the basis that, otherwise, the effect of Rule 3.1.1 will be disputed. Given that the provision arises in a contract that is expressly governed by English law, and that the provision has already been considered by the English courts, it is appropriate, and may well be helpful to the courts in Sri Lanka, if I grant the declaration sought by the Club. I therefore am content to do so.