"You can't pick and choose": A useful restatement that third parties suing an insured's insurers direct are as much bound by the terms of the insurance contract as the insured. - Simon Rainey KC, Natalie Moore and Joseph Gourgey

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Introduction

Will a claimant, wishing to bring proceedings against an indemnity insurer abroad on the basis of the actions of its insured, be bound by the terms of the underlying insurance contract even though it is not a party to it?

This was the question considered by the Commercial Court in ***The London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime & Others*** [2024] EWHC 884 (Comm) in a claim for a final anti-suit injunction and declaratory relief.

Bright J, applying the decisions of ***Shipowners Mutual P&I v Containerships Denizcilik*** (The Yusuf Cepnioglu) [2016] EWCA Civ 386 and ***QBE Europe SA NV v Generali Espana de Seguros*** [2022] EWHC 2062 (Comm), held that a third party seeking to claim the benefit of an insurance contract to bring proceedings against an insurer will be bound by its terms, including the arbitration agreement contained therein. He accordingly granted a quasi-contractual final anti-suit injunction.

Bright J also considered the effect of a "pay to be paid" clause in the insurance contract, granting a declaration to the effect that the indemnity insurer was under no liability to cargo interests unless and until they had been paid in full by the insured.

Background

The claim arose out of the sinking of the container ship the X-Press Pearl (**"the Vessel"**) off Sri Lanka on 2 June 2021. The Vessel was insured by the London Steam-Ship Owners' Mutual Insurance Association (**"the Club"**) pursuant to a contract of insurance incorporating the Club's Rules (**"the Insurance Contract"**).

Various plaintiffs in Sri Lanka who asserted an interest in the cargo on board (**"the Cargo Claimants"**) brought proceedings in May and June 2023 against both the Vessel interests and the Club.

The Club consequently applied for a final anti-suit injunction and declaratory relief, in support of its right to be sued only by a claim referred to arbitration in London, subject to the terms of the Insurance Contract.

The Decision

In considering whether to grant the injunction, the Court relied upon the following legal principles, derived from the Court of Appeal decision in The Yusuf Cepnioglu and Foxton J in QBE Europe:

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. 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 former, and if the insurance contract is subject to English law, then the right being asserted must be governed by English law.

2. If so, the foreign claimant is treated as bound by the insurance contract, including the arbitration provisions. This is on the "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.

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 observe the arbitration agreement in the insurance contract, then it is open to the insurer to apply for an anti-suit injunction against the foreign claimant. The court will generally grant an anti-suit injunction unless there are good reasons not to do so.

Applying these principles to the present case, Bright J noted that the evidence adduced at the trial showed that the Cargo Claimants' claims against the Club were brought solely on the basis of the Club's liability "as the insurer" [15]. This arose out of, and necessarily depended on, the terms of the insurance contract. He therefore had no difficulty in finding that the Club was entitled to be sued only by reference to arbitration in London.

In considering whether there were any good reasons not to grant an injunction, the Court found that: (1) the Club had not submitted to the jurisdiction of the Sri Lankan court despite entering an appearance because it made clear that it contested the jurisdiction of that court; and (2) whilst the application could have been brought sooner, the Sri Lankan proceedings had not advanced materially or at all on the merits, nor could there be any reasonable perception of material interference with those proceedings. The Court concluded that 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" [36], there was no good reason not to grant the anti-suit injunction.

Bright J also considered the Club's claim for a declaration that it was entitled to rely upon the "Pay to be paid" clause in the Insurance Contract as against the third party Cargo Claimants. Following the House of Lords decision in ***The 'Fanti" and The 'Padre Island"*** [1991] 2 AC 1, he granted the declaration, stating that the Club was to be under no liability to the Cargo Claimants unless and until their claims had been paid in full by the insured.

Simon Rainey KC, Natalie Moore and Joseph Gourgey acted for the successful Claimant, instructed by Alistair Johnston, Maria Borg-Barthet and Richard Guy of Campbell Johnston Clark

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Simon Rainey KC

"He is a top-class advocate in every way, at the top of his game. He is a brilliant KC." (Chambers UK, 2024)
Simon Rainey KC is one of the best known and most highly regarded practitioners at the Commercial Bar. He has a reputation which is second to none for his intellect and legal analysis ("fantastically intelligent and tactically astute"). But he is equally well known to his clients as a cheerful team player, who rolls up his sleeves in long and complex trials and arbitrations and who prides himself on high standards of client care

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Joseph Gourgey joined Quadrant Chambers on 1 October 2021, upon successful completion of pupillage. He is developing his practice in line with Chambers' core areas of work. He graduated from St Hilda's College, Oxford with a first in jurisprudence, obtaining the College prize in both Finals and Prelims. On the BCL he studied Commercial Remedies and Conflicts of Law, winning the Reynolds Scholarship from Worcester College, Oxford. He completed the BPTC with an Outstanding.

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