Neutral Citation Number: [2010] EWHC 3003 (Comm)

Case No: 2010 FOLIO 1230

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2010

Before :

MR. JUSTICE TEARE

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Between :

STAR REEFERS POOL INC.	**Claimant**
- and -	
JFC GROUP CO. LTD.	**Defendant**

- -
- -

Charles Kimmins QC and Luke Pearce (instructed by **Stephenson Harwood**) for the **Claimant**
Steven Gee QC and Peter Stevenson (instructed by **Swinnerton Moore**) for the **Defendant**

Hearing dates: 8 November 2010

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Judgment

Mr. Justice Teare:

1. This is an application by the Claimant to continue an anti-suit injunction granted by Christopher Clarke J. on 15 October 2010. It is opposed by the Defendant.

2. By a charterparty concluded on or about 4 April 2008 the Claimant chartered two of its vessels to Kalistad Ltd. for a period of 36 months. The charterparties provided by box 4 that "due performance" was "guaranteed by JFC [the Defendant] in everyway." By a further charterparty dated 15 July 2008 the Claimant chartered another of its vessels to Kalistad Ltd. for a period of 36 months. Again, by box 4 of the charterparty "due performance" was "guaranteed by JFC in everyway." Clause 59 of each charterparty provided for disputes arising under the charterparty to be referred to arbitration in London and for English law to apply.

3. By a document on the headed note paper of the Defendant and signed on behalf of the Defendant it was certified that "our company guarantees the performance of the Charter Party dated 4-4-2008 …for the account of our nominee, Kalistad Limited, Nicosia." A similar document, also signed on behalf of the Defendant, certified that "our company guarantees the performance of the Charter Party dated 15-7-2008 …for the account of our nominee, Kalistad Limited, Nicosia." It appears that drafts of the charterparties and guarantees had been sent by the Claimant to the Defendant by

email dated 11 July 2008 and 4 August 2008. The signed guarantees were received by the Claimants in London on 13 October and 19 November 2008.

4. The charterer said it faced "difficulties because the number of ships under its control turns out to be excessive in current adverse conditions." As a result hire was unpaid and on 12 March 2010 the Claimant commenced arbitration "in respect of the outstanding hire due from Charterers under the above Charterparty, the due performance of which JFC Group Co. Ltd. [the Defendant] have guaranteed, together with any and all disputes arising thereunder." On 26 March 2010 the Defendant replied pointing out that the charterparty was an agreement between the Claimant and Kalistad Ltd. and that the Defendant was not a party to it. There was therefore no arbitration agreement between the Claimant and the Defendant. However, without prejudice to that contention, the Defendant appointed an arbitrator.

5. There was a meeting in June 2010 between the parties. No mention was made by the Defendant of any intention to commence proceedings in Russia.

6. On 23 June 2010 the Defendant commenced proceedings against the Claimant in Russia in which it claimed that whilst it had sent letters to the Claimant demonstrating its readiness to conclude a guarantee no reply had been received and so the Defendant did not consider itself obliged to act as guarantor of the charterers.

7. The Russian court fixed a hearing for 6 September 2010. On that day the Defendant demanded that the claim be awarded in full. The court did not do so; it seems because there was no sufficient evidence of service. The hearing was adjourned to 15 November 2010.

8. On 15 September 2010 the Defendant alleged that the Claimant had breached the charterparties, that such breaches were repudiatory and that the defendant had accepted them as terminating the charterparties.

9. On 13 October 2010 the Claimant issued proceedings in this court seeking payment from the Defendant of the sums not paid under the charterparties by way of damages for breach of the guarantees. On 15 October 2010 the Claimant sought and obtained from Christopher Clarke J. an anti-suit injunction which ordered the Defendant not to pursue, or take further steps in, the Russian proceedings.

10. The hearing of the Claimant's application to continue that application was heard on 8 November 2010. On that occasion the court was not informed that on 1 November 2010 the Claimant had issued an application in the Russian proceedings seeking a dismissal of the Russian proceedings on the grounds that the Russian court lacked jurisdiction to hear the case. I have been told by the Claimant's solicitors that the application issued on 1 November was issued because, in the absence of the application, there was a risk that the Russian court might enter a default judgment against the Claimant. It was also suggested that the application was not relevant to the application in this court to continue the anti-suit injunction and accordingly by not disclosing the application there had not been a failure to make full and frank disclosure to this court. I am surprised by this latter contention. The Claimant's Skeleton Argument prepared for the *ex parte* hearing on 15 October 2010 expressly dealt with the Russian proceedings at paragraphs 17-24 and with a possible argument that the defendant might run, namely, that the Claimant should first have applied for a

stay of the Russian proceedings, at paragraph 62. It was said that such a challenge might take a year and a half to resolve and in any event the Claimant was not obliged to seek a stay in Russian before seeking an anti-suit injunction from this court. In my judgment the application of 1 November 2010 ought to have been mentioned to the court on 8 November 2010 so as to ensure that this court had a complete picture of the Russian proceedings.

The applicable principles

11. There was no dispute that where there is no arbitration or jurisdiction clause the governing principles (see *SNIA v Lee Kui Jak* [1987] 1 AC 871) were that:

> 1. The jurisdiction to grant an anti-suit injunction is to be exercised when the ends of justice require it.
>
> 2. In general two conditions must be satisfied:
>
> > (i) The English Court must be the natural form for the resolution of the dispute; and
> >
> > (ii) The conduct of the respondent must be vexatious, oppressive or unconscionable.

12. Mr. Charles Kimmins QC, counsel for the Claimant, submitted that the English Court is the natural forum for the resolution of the dispute. The first matter relied upon in this regard was that the applicable law of the guarantees was English law.

13. Mr. Kimmins submitted that the applicable law of the guarantees was English law by reason of an implied choice of English law by the parties to them pursuant to Article 3 of the Rome Convention. The facts which were relied upon in this context were in essence: that the primary obligations guaranteed were expressly governed by English law and that there was a close connection between the primary obligor and the guarantor, namely, that the charterers were the chartering arm of the Defendant. In this regard reliance was placed on *Broken Hill v Xenakis* [1982] 2 Lloyd's Reports 304 at p.306 and *Emeraldian Wellmix Shipping* [2010] EWHC 1411 at paragraph 170.

14. Mr. Steven Gee QC, counsel for the Defendant, submitted that there was no implied choice and that the applicable law was Russian, being the law with which the guarantee was most closely connected in that the party who was to effect the performance which is characteristic of the contract of guarantee was the guarantor whose central administration was in Russia; see article 4(2) of the Rome Convention.

15. I accept the submission of counsel for the Claimant. In my judgment the circumstances of the case demonstrate with reasonable certainty that the parties have chosen English as the applicable law of the guarantee. Those circumstances are, firstly, the very close connection between the charterers and the guarantor and, secondly, the express choice of English law by the charterer as the applicable law of the charterparty. Those circumstances demonstrate that the Defendant was content that English law governed the charterparty and that, in guaranteeing the obligations of the charterer, it is very likely to have contemplated that English law would also govern its obligations. Likewise the Claimant, who expressly chose English law as the

applicable law of the charterparty must have contemplated that the guarantee, which was expressly mentioned in the charterparty, would also be governed by English law.

16. That English law is the applicable law of the guarantees strongly suggests that England is the natural forum for the resolution of the dispute between the Claimant and the Defendant. In addition the relevant documents are in English, the Claimant's witnesses live in England and the experts appointed by the parties are based in England. Furthermore, the English proceedings will determine all aspects of the dispute between the parties whereas the Russian proceedings concern the single question whether a guarantee was agreed. The only factors which suggest that Russia is the natural forum are that the Defendant is domiciled in Russia and that the guarantee appears to have been signed in Russia.

17. In my judgment England is clearly the natural forum for the resolution of the disputes between the parties.

18. Mr. Kimmins submitted that the conduct of the Defendant in commencing proceedings in Russia was vexatious, oppressive and unconscionable because those proceedings were an attempt to "hi-jack" the proceedings in England. The use of the word "hi-jack" is taken from *Tonicstar v AHA* [2005] 1 Lloyd's Rep. 32 and indicates that the proceedings in Russia were commenced in a tactical attempt to frustrate the resolution of the disputes between the parties in England, the natural forum for the resolution of those disputes.

19. I consider it more likely than not that the Russian proceedings were commenced with a view to frustrating the determination of the dispute in England. The Russian proceedings were commenced after arbitration proceedings had been commenced in England and were commenced without warning. No suggestion had been made before the proceedings were commenced that the guarantees were not binding obligations. Although it is true that the arbitration proceedings against the Defendant were invalid (because the arbitration clause was in the charterparties and not in the guarantees) the commencement of arbitration showed that the Claimant wished to have the claim under the guarantees determined in accordance with English law which was the applicable law of the guarantees. The unheralded commencement of proceedings in Russia by the Defendant to take a point not mentioned before suggests that the Defendant simply wished to prevent the dispute from being determined in accordance with English law, the applicable law of the guarantees.

20. Moreover, the apparent weakness of the point sought to be taken in Russia also suggests that the proceedings are vexatious and oppressive, notwithstanding that the point is supported by evidence from a Russian lawyer. To the eyes of an English lawyer there is clear evidence, namely, the documents signed by the Defendant, that the Defendant accepted the obligations of a guarantor and did not merely demonstrate its readiness to conclude a guarantee. However, were the matter to be resolved in Russia the Russian court would apply its own law. Both parties have adduced evidence of Russian law. One Russian lawyer says that the guarantees are not enforceable as such in Russian law. The other says that they are. I cannot resolve that dispute on this application but the evidence of the Russian lawyer relied upon by the Defendant is surprising.

21. It is common ground that article 434.2 of the Russian Civil Code provides as follows:

> "The contract in written form shall be concluded by compiling one document, signed by the parties, and also by way of exchanging the documents by mail, telegraph, teletype, telephone, by the electronic or any other type of the means of communication, which makes it possible to establish for certain that the document comes from the party to the contract."

22. Thus Russian law appears to require either a document signed by both parties or an exchange of documents. Articles 435 and 438 refer to offers and acceptances which would appear to be instances of a contract concluded by an exchange of documents.

23. Mr. Zenin, a Professor of Civil Law at Moscow State University, has provided a report on behalf of the Defendant. He has suggested that "since the letters are only signed by the guarantor, and there is not another document signed by Star constituting an "acceptance", there is no valid and enforceable contract of guarantee under Russian law."

24. However, if the documents signed by the Defendant which purport to be guarantees are not binding as such, because they are not signed by both parties, there was nevertheless an exchange of documents between the parties, namely, the provision of the draft guarantees by the Claimant to the Defendant and the returned signed copies of those guarantees by the Defendant. It is very difficult to accept, notwithstanding Mr. Zenin's arguments to the contrary, that in Russian law such an exchange does not result in a binding guarantee.

25. Thus the circumstances in which the Russian proceedings were commenced coupled with the apparent weakness of the point sought to be argued in those proceedings strongly indicate that the proceedings in Russia are vexatious and oppressive.

26. It therefore appears to me that the anti-suit injunction was properly granted and should be continued.

27. Mr. Gee canvassed broad issues of law relating both to the jurisdiction to grant interim anti-suit injunctions and to the development of the law with regard to such injunctions. But ultimately the points he settled on were these:

    i) The court lacked power to permit the service of the application for an interim anti-suit injunction out of the jurisdiction because it was not "any other document in the proceedings" within the meaning of CPR 6.37(5)(b)(ii) or CPR 6.38(1), not being ancillary relief "in protection of its jurisdiction and its processes, including the integrity of its judgments"; see *Masri v Consolidated Contractors International and others* [2009] QB 503 at para.26 per Lawrence Collins LJ.

    ii) The Russian proceedings were not vexatious because the Defendant had not first submitted to the jurisdiction of the English court and then commenced proceedings abroad. In other cases where proceedings had been held to be vexatious the defendant had acted in that manner; see *Tonicstar* (above), *Masri* (above) and *Glencore International AG v Metro Trading International Inc* (No.3) [2002] CLC 1090.

iii) There was no justification for the Claimant to have applied for an anti-suit injunction *ex parte* and so, in the exercise of the court's discretion, the injunction should not be continued.

28. I am satisfied that the court has power to permit service out of the jurisdiction of this application for an anti-suit injunction. The claim form in this action has been properly served out of the jurisdiction. No argument to the contrary was advanced. The application for an anti-suit injunction is a "document in the proceedings" within the meaning of CPR 6.37 and 6.38. If it is necessary to put a gloss on those simple words by reference to the judgment of Lawrence Collins in *Masri* then the application was for an ancillary order "in protection of [the court's] jurisdiction and its processes, including the integrity of its judgments." That is because the grant of the injunction prevents any risk of issues in the English proceedings being resolved by an issue estoppel arising out of the Russian proceedings and without regard to the principles of English law which is the applicable law of the guarantees.

29. I am also satisfied that a defendant's pursuit of proceedings abroad can be vexatious notwithstanding that the defendant has not previously submitted to the jurisdiction of the English court. No doubt it is particularly vexatious where that happens but there is no requirement that there must be a submission before a defendant's conduct can be said to be vexatious. What is vexatious cannot be exhaustively defined.

30. Mr. Gee submitted that the present case is simply one where there are two courts, each with its own conflict of law principles. One party has chosen to sue in one court and the other in the other court. There is nothing vexatious in the conduct of either party. Both sets of proceedings should be permitted to continue. I accept that there may be cases where the pursuit of parallel proceedings in two courts may not be vexatious. That is clear from the speech of Lord Goff in *SNIA v Lee Kui Jak* (above) where it is emphasised that an anti-suit injunction cannot be granted merely on the basis that England is the natural forum for the resolution of the dispute between the parties. In addition it must be shown that the proceedings are vexatious and oppressive. For the reasons which I have endeavoured to describe I consider that the Russian proceedings are vexatious and oppressive.

31. So far as proceeding *ex parte* is concerned this was specifically addressed n paragraph 64 of the Claimant's Skeleton Argument before Christopher Clarke J. It was pointed out that the next hearing in Russia was 15 November 2010 and that it was unlikely that an *inter partes* hearing could be fixed in the Commercial Court before then and that in any event an application could be filed in Russia at any time without warning. Given the desire of the Defendant to secure judgment in Russia without delay, as was evident from its request for judgment on 6 September 2010, it seems to me that it was appropriate for the Claimant to proceed *ex parte* on 15 October 2010.

32. I have also considered whether the circumstance that I was not informed when this matter came before me on 8 November that the Claimant had issued its own application in the Russian Court on 1 November is a reason for refusing to continue the anti-suit injunction. I am not persuaded that it is. The application did not involve a submission to the jurisdiction. The application, like the one before this court, is designed to ensure that the Russian court does not decide the dispute between the parties. It ought however to have been disclosed to this court so that it was aware of the full picture.

33. I have therefore concluded that the anti-suit injunction should be continued.