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London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime (Pvt) Ltd & Ors [2024] EWHC 884 (Comm)

Overview

In this case, the Court granted an anti-suit injunction in favour of the claimant, a P&I Club (the "**Club**"), against cargo interests pursuing damages for lost cargo in Sri Lanka following the sinking of a container ship, the X-Press Pearl (the "**Vessel**"). The Court held that the cargo interests were bound by the London arbitration clause in the contract of indemnity insurance (the "**Insurance Contract**") and that there was no good reason not to grant an anti-suit injunction.

Facts

- Pursuant to the Insurance Contract, the Club insured the Vessel and its owners against P&I risks.
- Under the terms of the Insurance Contract:
 - (1) English law applied;
 - (2) Any claim against the Club under the Insurance Contract was to be referred to arbitration in London;
 - (3) By contrast, the Club was entitled to take legal action in other fora, in order to pursue or enforce its rights; and
 - (4) It was a condition precedent to any right to recover from the Club that the assured must first have paid the full amount of its liabilities (i.e. the 'paid to be paid' rule).
- In June 2021, the Vessel sank off the coast of Sri Lanka. Subsequently, a Sri Lankan company (the "**First Defendant**") and four Sri Lankan citizens (the "**Second to Fifth Defendants**") (together the "**Cargo Claimants**") commenced legal proceedings individually in Sri Lanka in connection

with each of their respective claims for the lost cargo (the "**Sri Lankan Proceedings**"). The Club was said to be liable in the Sri Lankan Proceedings "*as the insurer*".

- In response to the commencement of proceedings by the Cargo Claimants in Sri Lanka, the Club began an arbitration claim in England, seeking a final anti-suit injunction and declaratory relief from the English High Court (the "**English Court**") in connection with its right to only be sued by a claim referred to arbitration in London, pursuant to the terms of the Insurance Contract (the "**English Proceedings**").
- The Cargo Claimants did not appear at the hearing and were not represented. The English Court commented that this was a deliberate decision made by the Cargo Claimants not to engage in the English Proceedings. The English Court considered that the Cargo Claimants were given sufficient notice of the English Proceedings.

The parties' positions

- In the Sri Lankan Proceedings, the Cargo Claimants alleged 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 was named as liable "*as the insurer*".
- During the English Proceedings, the Club called on evidence from a Sri Lankan lawyer who outlined the basis of the Cargo Claimants' claim against the Club in Sri Lanka:
 - (1) The claim was in respect of loss and damage to goods carried in a ship, which constituted a maritime claim under Section 2(1)(g) of the (Sri Lankan) Admiralty Jurisdiction Act No.40 1983;

- (2) Cargo Claimants asserted that the Club was liable as an insurer;
- (3) Sri Lankan law does not specifically provide for a direct right of recovery against the insurers in respect of claims arising out of the incident involving the Vessel; and
- (4) In the absence of any applicable local statute or common law, in determining whether the Club has any liability to the Cargo Claimants, the Sri Lankan court would (i) "look to the terms of the insurance policy between the Club and its assured" and (ii) "have to apply English Law" as the governing law of the Insurance Contract where the English Court would have to consider the "pay to be paid" clause in Rule 3.1 of the Club's Rules.

Therefore, the Sri Lankan Proceedings were not based on an independent right of recovery against the Club under Sri Lankan law. Rather, they were based solely on the fact that the Club was liable "as the insurer". The English Court therefore concluded that the Sri Lankan court would take the terms of the Insurance Contract into consideration when determining whether the Club was liable.

- The English Court was asked to consider whether the Cargo Claimants had the right to sue the Club "as the insurer" of the Vessel in Sri Lanka, despite the fact that the Insurance Contract stipulated that any arbitration must take place in London.
- The Cargo Claimant's position was that since their claims did not strictly arise under the Insurance Contract (as they were not parties to the Insurance Contract) the arbitration clause did not apply.
- However, the Club asserted that given that the Sri Lankan court would look to the terms of the Insurance Contract in order to infer the Club's liability in respect of cargo losses/damage, the conditions of that contract, including the arbitration clause, must also apply. The Club therefore sought a final anti-suit injunction from the English Court preventing the Cargo Claimants from continuing the Sri Lankan Proceedings.

The 'pay to be paid' rule

Rule 3.1 of the Club's Rules provided as follows:

"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".

Provisions like this are common in P&I insurance contracts and their purpose is to prevent direct claims by third parties against P&I insurers. This is because their ordinary and natural construction means that the assured members are not entitled to be indemnified by the club unless and until members have first discharged their liabilities in respect of which they sought an indemnity from the club (*The "Fanti"* and *The "Padre Island"*).

Rule 3.1.1 was considered in separate proceedings involving the Club where it was decided by the English Court that the clause operated as a complete defence if the liability in question has not been discharged by the insured members, as such discharge acts as a condition precedent to the insured member being indemnified by the club (*London Steam-Ship Owners' Mutual Insurance Association Ltd v Spain* [2013] EWHC 3188 (Comm), [2014] 1 Lloyd's Rep 309).

When making its decision, the English Court drew on the fact that the provision arose in an insurance contract that is expressly governed by English law and that the specific provision had already been considered in the English courts. Similarly, the English Court also took into consideration the evidence provided by the Club on behalf of the Sri Lankan lawyer who asserted that as Sri Lankan law does not have a directly applicable statute or common law on the matter, the Sri Lankan court would have to apply English law as the law governing and construing the application of the Club's Rules.

English law principles applicable to insurers' anti-suit injunctions

It is common for a claimant outside of the jurisdiction to bring a claim in its own country against an English indemnity insurer alleging wrongful acts against a defendant who is insured against liability by the indemnity insurer. In these circumstances, where the insurance contract is subject to English law and jurisdiction, the insurer will inevitably seek to prevent the claimant from pursuing proceedings outside of England.

This gives rise to questions as to whether the claimant can be bound by the terms of the relevant insurance contract, despite not being a party to it.

As this is a common issue, there are several court authorities that have considered this. The key relevant authorities can be summarised as follows:

- (1) The right being asserted by the claimant in the foreign proceedings should first be classified by reference to English conflict of law principles (*QBE Europe SA NV v Generali Espana de Seguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd's Rep. 481 and *The Yusuf Cepnioglu* [2016] EWCA Civ 386). This is to ascertain whether the foreign claimant is seeking to enforce a contractual obligation derived from the insurance contract 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 also be governed by English law.
- (2) If this is the case, then the claimant will be bound by the insurance contract, despite not being a party to it. This includes the contractual provisions as to arbitration. This is based on the 'benefit and burden' principle; 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 (*QBE Europe SA NV v Generali Espana de Seguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd's Rep. 481).

Where stages (1) and (2) above lead to the conclusion that the foreign claimant is bound to the arbitration agreement in the insurance contract, then the insurer can apply for an anti-suit injunction against the foreign claimant (*QBE Europe SA NV v Generali Espana de Seguros* [2022] EWHC 2062 (Comm), [2022] 2 Lloyd's Rep. 481 and *The Yusuf Cepnioglu* [2016] EWCA Civ 386).

The English Court will typically grant an anti-suit injunction unless there is a good reason to the contrary.

Applying the principles to this case

- (1) The Cargo Claimants' claim against the Club was brought solely on the basis that the Club was liable "as the insurer".
- (2) The Sri Lankan law evidence confirmed that the approach of the Sri Lankan court would be to apply English law on the basis that the Insurance Contract is subject to English Law.
- (3) The English Court concluded that the Cargo Claimants' claims were not independent of the Insurance Contract because those claims

were founded on the existence of the Insurance Contract itself.

- (4) The English Court also concluded that whether by application of the "benefit and burden" principle or on the basis that the obligation to arbitrate is a legal incident of the rights and obligations under the Insurance Contract, the Cargo Claimants were bound by the agreement to arbitrate in London as per the Club's rules (which were incorporated into the Insurance Contract).
- (5) It followed that the Club was entitled to an anti-suit injunction unless there was a good reason why one should not be granted.

Decision of the English Court

The English Court made its decision based on the following points:

- (1) The Club became aware of the Sri Lankan Proceedings in May 2023 and issued its application raising its preliminary objections to the claim in respect of jurisdiction, in August 2023 (the "**Application**"). However, during the hearing, the English Court made clear that the Club should not simultaneously be seeking anti-suit relief in England whilst actively pursuing applications in response to the claims in Sri Lanka. The Club therefore withdrew its Application subject to the request that the Sri Lankan court take judicial notice of the anti-suit injunction and dismiss and/or stay the Sri Lankan Proceedings. In doing this, the Club made clear that it contested the jurisdiction of the Sri Lankan court. Whilst the English Court held that the anti-suit proceedings could have been brought sooner by the Club, the Court decided that no reasonable delay had occurred because (i) the Sri Lankan Proceedings had not developed materially or at all on the merits and (ii) the Club had not submitted to the jurisdiction of Sri Lanka in any way so there could not be any material interference with the Sri Lankan Proceedings.
- (2) The English Court noted that the Cargo Claimant's claims were brought solely on the basis that the Club was liable as the insurer.
- (3) The English Court also noted the evidence provided by the Sri Lankan lawyer on behalf of the Club asserted that the approach of the court in Sri Lanka would be to apply English law to the claims brought by the Cargo Claimants against the Club, on the basis that

the Insurance Contract is subject to English law. The English Court agreed with this approach.

- (4) The English Court also emphasised that whether under the '*benefit and burden*' basis or on the basis that the obligation to arbitrate is a legal incident of the obligations under the Insurance Contract, the Cargo Claimants are in any event bound by the arbitration agreement in Rule 43.2 of the Club's Rules (which was incorporated into the Insurance Contract by a Certificate of Entry).
- (5) The English Court further concluded that the Club was only entitled to be sued by way of arbitration in London and as such is entitled to an anti-suit injunction bringing a stop to the proceedings in Sri Lanka.
- (6) Lastly, against this background and in circumstances where the Cargo Claimants did not appear at the hearing to assert the existence of any good reason why the English Court should not grant the anti-suit injunction sought by the Club, the English Court held that there was no good reason why it should not be granted.

The English Court therefore granted the anti-suit injunction in favour of the Club.

Comment

This case emphasises that English courts will uphold the '*benefit and burden*' principle when considering the rights of foreign claimants to proceed against a party based on an insurance contract governed by English law.

However, perhaps the most pertinent element of this case for P&I Clubs is the English Court's consideration of the Club's non-submission to the Sri Lankan court when considering whether to grant an anti-suit injunction.

Implied here is that the arbitration clause in the indemnity insurance contract might not have applied had the Club been deemed to have accepted the jurisdiction of the foreign court. Parties should therefore carefully consider how they should engage in foreign proceedings being brought against them (if at all) in order to challenge the jurisdiction. This is often an difficult predicament, and this case serves as a potent reminder Clubs not to engage in foreign proceedings issued against them without first seeking legal advice.

This case also serves as text-book reminder of the "dos and don'ts" of a classic anti-suit injunction application.

The full judgment can be found here: [London Steam-Ship Owners' Mutual Insurance Association Ltd v Trico Maritime \(Pvt\) Ltd & Ors \[2024\] EWHC 884 \(Comm\) \(23 April 2024\) \(bailii.org\)](#)

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