



Not all anti-suit applications are a sure thing

CJC recently acted for the Defendants in successfully defending a novel pair of applications by Claims for (i) an anti-suit injunction application and (ii) an application to preserve proceeds from another matter in arbitration proceedings in the UK. *Allen Marks*, Director and *David Fittis*, Trainee, CJC, summarise the case of *E-Star Shipping and Trading Co Ltd v Delta Corp Shipping Ltd [2022] EWHC 3165*.

CJC [*Allen Marks* / *Neil Jackson*] recently acted for the Defendants in successfully defending a novel pair of applications by Claims for (i) an anti-suit injunction application and (ii) an application under section 44 of the Arbitration Act 1996 to preserve proceeds from another matter in arbitration proceedings in the UK. CJC's success shows that not all anti-suit applications are certain to succeed.

Background Facts

Delta Corp Shipping (the "Defendant") chartered the ESHIPS PROGRESS (the "Vessel") from the head owners. Further down the charter chain the E-Star Shipping and Trading Company Limited (the "Claimant") voyage chartered the Vessel, albeit not from the Defendant. There were also several sub-charters under which E-Star agreed carriage contracts with various unrelated parties. Hire for the voyage was not paid all the way up the charter chain and disputes ensued, leading to an alleged settlement agreement (SA) between various of these parties, including the Claimant and the Defendant, providing for payment of outstanding sums. Not all of these payments were made. The SA was subject to English law and contained an arbitration agreement. Importantly, it also provided that it would become effective only on signature by all parties.

The Defendant, on 27 July 2022, obtained an order from the court in Benin that the cargo be discharged into the custody of the court. Proceedings were subsequently initiated by 15 plaintiffs in Benin against, inter alia, the Claimant and the Defendant to set aside the court orders and obtain possession of the cargo. The majority of them, specifically 12, were receivers of the cargo who were not a party to the SA. Of the three remaining plaintiffs, two were shippers who had signed the SA and one was a shipper for whom a signed SA could not be located by the Claimant.

The various plaintiffs were ordered to pay the sums due to the relevant parties or the cargo would be sold. Whilst some cargo interests paid sums due, others failed, and their cargo was at risk of being sold.

The application

The Claimant applied to the English court seeking an anti-suit injunction, and separately for relief under section 44 of the Arbitration Act 1996 to protect the proceeds of any sale funds. Both applications were dismissed by the court.

Anti-suit application

1. Appearing for the Defendant, Mr Chris Smith KC stated that in the context of any anti-suit injunction application, there must exist a binding arbitration clause. In this regard, the SA, which was relied upon by the Claimant's for containing the arbitration clause, contained a very clear provision that it was only to become effective on signature by all the parties. As touched upon above, a signed SA for all parties could not be located. On this reason alone, the application failed.

2. Additionally, the application failed because it was not really an application for an anti-suit injunction at all. The Benin proceedings had, in substance, concluded. An injunction was sought in order to stop a defendant from continuing proceedings, which made this an anti-enforcement injunction application in circumstances where the Benin proceedings had ceased, at least in any meaningful sense.
3. The third reason for the failure of the application, applicable to both anti-suit and anti-enforcement applications, was delay. The Court held that it is well established that parties must act reasonably promptly in bringing anti-suit proceedings and certainly before related foreign proceedings are too far advanced. It was evident here that this was not the case. The foreign proceedings were advanced to the point where a judgment had actually been given. There was no satisfactory evidence as to why the Claimant had not acted to seek anti-suit relief whilst those proceedings were underway.

Section 44 of the Arbitration Act 1996

The dismissal of the anti-suit injunction did not, however, dispose of the application under section 44.

The Claimant's proposed order effectively sought to preserve the proceeds of any sale of the cargo, pursuant to the Benin Court order, albeit not for themselves as they recognised that they would not be entitled to the proceeds of sale. The Claimant's contention was that it would be permissible for them, within the context of the arbitration proceedings, to seek relief designed to preserve that asset.

The Defendants' position was that this was a bizarre application. The parties with an interest in the sale proceeds were the Benin plaintiffs whose cargo may have been sold. The evidence suggested many of those plaintiffs had made payment into court. Those who did not make payment into court were at liberty to seek relief from the English court but did not.

Furthermore, the shippers in Benin positively sought to assert their rights in Benin. As far as they were concerned, their dispute had nothing to do with the English court.

Relief under the Arbitration Act was denied for two reasons:

1. The court was not satisfied there was an effective arbitration agreement.
2. The Benin court had considered at length the question of how to deal with the cargo. It was considered appropriate that payment be made into court, not the Defendant, and there was no evidence that any of the other shippers, who had not yet done so, would not take advantage of that. It was for the Benin court to decide whether any additional protection be afforded to those shippers who may fail to make payment into court.

Comment

Anti-suit injunction proceedings must be brought as swiftly as possible. This case illustrates the reluctance of judges to issue such injunctions in circumstances where there has been an undue delay by the party seeking relief.

Additionally, where a party looks to obtain relief under the Arbitration Act 1996 the applicant must take care to ensure that there is first a binding arbitration agreement. The absence of such will be grounds for dismissal of the application before any further substance is considered.

For further information, please contact:



Allen Marks

Director

Allen@cjclaw.com

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