If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 2641 (Comm)

No. CL-2021-000326

The Rolls Building
7 Rolls Buildings, Fetter Lane
London, EC4A 1NL

Thursday, 9 September 2021

Before:

MRS JUSTICE MOULDER

B E T W E E N :

HAPPY SHIPPING LIMITED
(OWNERS OF THE M/V "HAPPY LUCKY") — Claimant/Applicant

- and -

MARINE SHIPPING COMPANY LIMITED
(OWNERS OF THE M/V "FESCO VOYAGER") — Defendant/Respondent

MR J. PASSMORE QC (instructed by Campbell Johnston Clark) appeared on behalf of the Claimant.

MR J. WATTHEY (instructed by Hill Dickinson LLP) appeared on behalf of Defendant.

J U D G M E N T

(via Remote Hearing)

MRS JUSTICE MOULDER:

1 This is an application for an interim anti suit injunction. It was issued on 21 May 2021. The purpose of the application is to prevent the continuation of proceedings brought by the respondent in Singapore in relation to a collision which occurred between vessels owned by the applicant and the respondent respectively.

2 Both parties were represented by counsel before me today and the parties have filed evidence and skeleton arguments. In support of the application I had three witness statements of Mr Johnston of Campbell Johnston Clark, acting for the applicant, dated 21 May, 25 June and 1 September 2021. I also had a witness statement of Mr Segolson. In response to the application I have a witness statement of Ms Duddington of Hill Dickinson acting for the respondent, dated 17 August 2021, and from Mr Haddon also of Hill Dickinson dated 17 August 2021.

Background

3 The background facts can be briefly stated. The claimant is the registered owner of the vessel, HAPPY LUCKY. The respondent is the registered owner of the vessel, FESCO VOYAGER.

4 On or about 28 April 2019 the vessels collided. Discussions then took place between P&I Clubs representing the parties as to security and jurisdiction, and those discussions are the subject of the issue between the parties on this application.

5 On 27 April 2021 the respondent issued proceedings in Singapore. A warrant of arrest was issued on 15 May 2021 relying upon the proceedings in Singapore.

6 Security was subsequently agreed so that the vessel could be released and this was expressly without prejudice to the claimant's right to argue that the proceedings should not have been brought in Singapore. An LOU was provided on 17 May 2021.

Relevant Law

7 The law on anti-suit injunctions was largely common ground. I was referred to the summary of the principles set out by Cockerill J in *Times Trading Corporation v. National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm). The court has the power to grant relief under s.37 of the Senior Courts Act 1981, where it is just and convenient. An order for relief may be unconditional or on such terms and conditions as the court thinks fit. If proceedings are shown to have been commenced in breach of an exclusive jurisdiction agreement this would ordinarily entitle the applicant to an anti-suit injunction, unless the respondent can show strong reasons for relief to be refused: *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87. The respondent in its submissions stresses the discretionary nature of the jurisdiction: *Emmott v. Michael Wilson & Partners Ltd* [2018] 1 Lloyd's Rep 299 at [36].

Issues

8 There are three issues for the court to consider:

(i) Firstly, whether or not there was an exclusive jurisdiction agreement;

(ii) secondly, if there was such an agreement should the injunction application be refused in any event on the basis that the respondent can show strong reasons;

(iii) thirdly, if the respondent is not successful in persuading the court that there are strong reasons to refuse the injunction, whether justice requires that conditions be imposed on any such injunction by reason of the time bar and the loss of security.

Exclusive jurisdiction agreement?

9 Dealing with the issue of whether there was an exclusive jurisdiction agreement reached in this case, it was submitted for the applicant that an exclusive English jurisdiction agreement was concluded between the P&I Clubs acting for the parties, and the Singapore proceedings are therefore in breach of that agreement.

10 For the respondent it was submitted that no such agreement was reached. The respondent submitted that the standard of proof required is "a high degree of probability": *Michael Wilson & Partners*, at [39].

11 The issue of whether there was an exclusive jurisdiction agreement in this case turns solely on the interpretation of the correspondence which is before the court and in particular in an exchange of emails between Mr Dawson of Thomas Miller, acting for the UK Club/ Fesco Voyager, and Mr Segolson for Skuld on behalf of HAPPY LUCKY and whether that shows that an agreement was reached.

12 The applicant says that the offer was contained in an email of 1 May 2019 from Mr Segolson to Mr Dawson in which Mr Segolson said:

> "We agree to AGS 2 format with English law/jurisdiction including limitation and can be drawn up after the public holiday as you and I discussed."

The applicant says that that offer was then accepted by an email of 21 May 2019, in which Mr Dawson said:

> "We have finally just received instructions from Members agreeing to English law and jurisdiction. I am still waiting for the security breakdown. I am in meetings most of today but will send a draft CJA letter for your approval."

13 The applicant relies on the entirety of the correspondence that is before the court, which the applicant submits provides the factual matrix and in particular an email of 30 April 2019 from Mr Dawson, which the applicant says provides important background to the offer and acceptance emails. In particular, it referred to urgency in view of the upcoming holidays and a desire to allow the vessels to sail. The applicant submits that the offer by Mr Segolson on 1 May was in accordance with the proposal by Mr Dawson in his email of 30 April, with the intention that the ASG 2 would follow and that the correct construction of Mr Dawson's email on 21 May 2019 was that it was an acceptance of the offer.

14 For the respondent it was submitted that the correspondence should be construed objectively and the evidence of subjective beliefs are irrelevant. It was submitted that no agreement was reached and no Collision Jurisdiction Agreement ("CJA") was ever entered into. The respondent submitted that the court can, and should, take into account as context the usual practice in the industry of the use of the ASG forms to settle jurisdiction and security issues.

15 Turning to the evidence I propose to highlight the emails which in my view are significant to the issue. The first is the email of 30 April 2019 from Mr Dawson to Mr Segolson:

> “As discussed, given the upcoming long holidays in your part of the world, and the desire of both ships to sail from Haiphong as soon as clearance is given by the local authorities, can you please confirm your firm commitment to provide, on behalf of the Owners of HAPPY LUCKY, a Skuld LOU to the owners of FESCO VOYAGER for their claim for damages arising out of the captioned collision for a reasonable amount (inc interest and costs) and in a wording to be agreed between the parties, whether the HAPPY LUCKY be lost or not lost. Please also confirm your agreement that the claims of each party, including the question of limitation of liability, shall be determined exclusively by the English Courts in accordance with English law and practice.
>
> We are seeking instructions from our Members for UK Club to provide a similar commitment to provide security to HAPPY LUCKY owners.
>
> We propose that a formal Collision Jurisdiction Agreement be signed (in ASG2 wording) upon resumption of business after the holiday period.
>
> Your early confirmation will be appreciated."

16 The applicant submitted that this email of 30 April 2019 sought a firm commitment and specifically envisaged that the agreement to English law and jurisdiction, and the reciprocal commitments to provide LOUs for security, would be binding before the ASG 2 form was signed. The applicant draws attention to Mr Dawson's words that this was so that both ships could "sail from Haiphong as soon as clearance is given by the local authorities." It was submitted for the applicant that 1 May 2019 was a holiday and in those circumstances Mr Dawson sought confirmation of Skuld's firm commitment to provide an LOU, and also Mr Segolson's confirmation of agreement to English law. The ASG 2 form, it was submitted, was to follow later after the holiday.

17 The respondent accepted that Mr Dawson in that email suggests English law and jurisdiction, but submits that he proposes the signature of the agreement take place after the holiday when instructions have been received and therefore that any agreement was conditional on signature of the ASG 2 form, which would deal with matters such as service of process and a warranty concerning the owners of the vessels. It was submitted for the respondent that any urgency related only to the provision of security and not to the issue of jurisdiction.

18 The next significant email was the email of 1 May 2019 in which Mr Segolson emailed various individuals at Thomas Miller:

> "We write further to our exchanges on security for the inter ship collision claims.

We can now on, HL owners/member’s behalf, confirm that we agree to reciprocal securities by way of respective Club LOUs. This means it is mutually agreed as follows as well. This is on a ship lost or not lost basis and only quantum and terms are to be agreed. We agree to ASG 2 format with English law/jurisdiction (including limitation) and can be drawn up after the public holiday as you and I discussed. As to quantum it shall be for (as you say) a reasonable amount and also for interest and costs and will be determined once the claim figures are clearer. We can then also arrange the ASG 1 forms.

Trust this suffice and await to hear." [emphasis added]

19 I note that the applicant submitted that the ASG 2 form was not contingent on the provision of security. Instead the form expressly imposed a future obligation on the parties to subsequently provide security to each other "in a form reasonably satisfactory to the other".

20 On 9 May 2019 Mr Segolson wrote to Mr Dawson:

> "We await to hear on in principle security ASAP. While I thought it was agreed if you take issue I think I should be told very soon. This to also avoid any unnecessary action.”

Mr Dawson responded on 10 May:

> "To clarify on security, we have indeed recommended exchange of security with English law and jurisdiction, and signing of CJA in ASG wording, and are pressing Members to confirm this. We hope to be in a position to revert very soon."

I note in passing that the respondent submitted that it was clear from this email that the signing of the CJA was expressly contemplated.

21 There were internal emails between Mr Dawson and Mr Pavel Vasilchenko of Fesco Voyager, and response from Ms Cherniavskaia to Thomas Miller, but these internal emails are not relevant to the objective construction issue.

22 The next significant email was that of 21 May from Mr Dawson to Mr Segolson (set out above). This is the email upon which the applicant relies to submit that this email amounted to an acceptance of Mr Segolson's offer. The applicant says that this email was an acceptance of the offer of a collision jurisdiction agreement on the ASG 2 form. Thus the applicant submitted that the ASG 2 form was incorporated by reference through this email and that the reference in the email to waiting for security breakdown is in line with the ASG 2, which provides that security will be provided in a form reasonably satisfactory to the other party. It is also submitted for the applicant that this email was in line with Mr Dawson's original proposal of 30 April.

23 For the respondent it is submitted that the UK Club clearly stated that it was still waiting for the security breakdown and that the UK Club will send the draft CJA "*later for your approval.*" It is submitted that such words clearly militate against a consensus existing between the parties and that there needed to be an agreement by executing the ASG 2 form and the security form. It was submitted for the respondent that the exchanges between the

parties and their respective P&I Clubs evidenced the fact that the parties continuously referred to the ASG form and security and not to a jurisdiction agreement in a vacuum.

24 On 20 June Mr Segolson emailed Mr Dawson:

> "Further to the agreement on English law and jurisdiction thought I should just send this email to ask you to send over the CJA (and breakdowns of amounts can be dealt with later too)."

There does not appear to have been a response to that email. There was a further chasing email from Mr Segolson to Mr Dawson on 15 July, and thereafter matters appear to have lapsed.

Discussion

25 I have considered carefully the evidence of the correspondence and as a preliminary point I note that these are emails which fall to be construed and not legal agreements. In my view the fact that Mr Dawson said in the email of 21 May that he had "instructions" is clear, but the question is instructions to do what? In my view one cannot read the words "instructions agreeing to English law and jurisdiction" and disregard the balance of the email when Mr Dawson says that he will send over a draft agreement. In my view, objectively, it is to be construed that he had instructions to agree to jurisdiction and to implement those instructions by sending over the draft agreement. I note that Mr Dawson said that he had "received instructions" that Members agreed. He did not say that he was agreeing to the terms of the offer.

26 In oral submissions counsel for the applicant accepted that the email from Mr Dawson did not have to expressly state that it was "subject to contract or formal documentation" in order to prevent a binding agreement from being formed. But counsel submitted for the applicant that there was nothing to that effect in the email. However, in my view, that assumes the point which it sets out to prove. There is no need for the email expressly to state that it was subject to contract if construed objectively it was clear that there was in fact no agreement.

27 In a similar vein, the respondent did not have to say expressly that the agreement was "in principle," because he did not say he was agreeing to law and jurisdiction. He did not say so and in my view was not doing so.

28 I do not accept the submission that a reference to sending the draft CJA means that the ASG 2 was somehow incorporated by reference. In my view the language of the email is consistent with an intention to be bound <u>only</u> when the ASG 2 was agreed and executed. In my view the express reference to sending a draft for approval in the email of 21 May does not support the submission that its terms had already been incorporated by reference into an agreement. Mr Segolson does not say that in his email. He says, "We agree to ASG 2 <u>format</u>." (emphasis added) Further, even if Mr Segolson intended to incorporate by reference ASG 2, that is a subjective intention and it was not, in my view, either spelled out or accepted by Mr Dawson.

29 If the ASG 2 was not incorporated by reference then there can be no reliance on what the terms of the ASG 2 provide in relation to future security. Mr Dawson said in his email of 21 May that he was waiting for the security breakdown. In my view the objective meaning of that is that Mr Dawson was not agreeing to the terms of the security and I infer that this was part of the overall agreement to be reached.

30 Mr Dawson did not, in my view, have to suggest that he was seeking to change the approach in his earlier email of 30 April in order to reject the offer which was made, since the applicant relies on the email of 1 May as constituting the offer and not the email of 30 April. An objective reading of the extent to which there was acceptance must be viewed primarily in the context of the offer and acceptance which is advanced. I accept that the 30 April email is factual context but it does not override, in my view, the offer and acceptance.

31 In terms of the factual context set out in the 30 April email, I accept that any urgency which was evident on the face of the email was related only to the issue of security and not to any apparent urgency in relation to the issue of jurisdiction. In my view the applicant's submission in effect rewrites the email by linking the urgency to both security and jurisdiction in a way which is not supported by the language of the email.

32 Although I accept that the evidence in the witness statement is that the agreement on jurisdiction can be decoupled from the security arrangements, and jurisdiction can be determined in advance as contemplated by the ASG 2 form itself, that does not appear to me to be the position here. But even if I were wrong on that and the security was a separate issue, in my view there was no agreement on jurisdiction. In my view the 21 May email was not an acceptance of the offer. It was an indication that Mr Dawson had instructions to agree to entering into an agreement and would seek to agree the ASG 2. Even if Mr Dawson had originally contemplated that the agreement would be binding before the ASG form was signed, and that was the offer made by Mr Segolson, in my view there was no acceptance of that offer. The email which the applicant relies on as the acceptance of the offer expressly states that a draft agreement would be sent "for your approval." Those words are not consistent with the CJA being, as submitted by the applicant, merely a record of an already complete and binding agreement.

33 The fact that no further correspondence appears to have taken place after 15 July is not, in my view, significant and does not support the applicant's argument. It is not necessary for further correspondence, or a denial to have taken place, in order for the conclusion of the court on the offer and acceptance to be correct. The subjective view of Mr Segolson as to what had occurred is not relevant and in any event, in my view, his email of 20 June with his reference to an "agreement on English law and jurisdiction" is equally consistent merely with the use of a shorthand reference. It is not therefore evidence which I find persuasive that an agreement had been reached.

Conclusion

34 Accordingly, having carefully considered the language of the correspondence and considered it against the factual background and commercial context, for the reasons discussed above, I am not satisfied that the claimant has established that an agreement as to English jurisdiction was reached. Accordingly the application for an anti-suit injunction is refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge.