Neutral Citation Number: [2021] EWHC 554 (Comm)

Case No: CL-2020-000129

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT(QBD)
AND IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 10/03/2021

Before :

SIR MICHAEL BURTON GBE
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

(1) ARGOS PEREIRA ESPAÑA S.L. **(2) GENERALI ESPAÑA S.A.**	**Claimants (Claimants in the arbitration)**
- and -	
ATHENIAN MARINE LTD	**Defendant (Respondent in the arbitration)**

- -
- -

Thomas Corby (instructed by **Preston Turnbull LLP**) for the **Claimants**
Alexander Wright (instructed **Sachs Solicitors**) for the **Defendant**

Hearing dates: 11 February 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 March 2021 at 10:30 am

SIR MICHAEL BURTON GBE :

1. This has been the hearing of an application, with permission, under s 69 of the Arbitration Act 1996 (the Act) by the Claimants, also Claimants in the Arbitration (the Consignee as First Claimant, and the Cargo Insurer as Second Claimant), against the decision of a sole Arbitrator, Mr William Robertson, on 10 February 2020, in favour of the Defendant, Respondent in the Arbitration (the Owner) on its counterclaim. The Consignee and the Insurer as Claimants were represented by Thomas Corby and the Owner as Defendant was represented by Alexander Wright.

2. The Arbitration arises out of a shipment of frozen fish and squid onboard MV Frio Dolphin (the vessel) by Bills of Lading dated 28/29 August 2012 and the discovery of defects in the cargo on arrival in Vigo, Spain. The Insurer, by subrogation from the Consignee, brought proceedings against Lavinia Corporation (Lavinia), the Owner's manager and the vessel's charterer, in Spain, on the mistaken assumption that Lavinia was the carrier, and after Lavinia had unsuccessfully challenged jurisdiction in Spain, such decision was reversed on appeal in March 2015, and Lavinia was awarded its costs, although only in a sum of €8425, leaving irrecoverable costs of €55,850.60, US$ 893.75 and £86.684.45 ("the irrecoverable costs"). The Owner pursued in the Arbitration a claim to recover the irrecoverable costs paid by Lavinia.

3. There was much for the Claimants to complain about in the Arbitrator's Award, in that he found (i) that the Consignee was in breach of its contractual obligation to arbitrate in bringing the Spanish proceedings (which it did not and hence was not) (ii) that the Insurer was in breach of its contractual obligation (which it did not have) to arbitrate in bringing the Spanish proceedings. Of six questions for which they sought permission, Waksman J gave permission in respect of those two findings, which he concluded to be obviously wrong, and the Defendant has not pursued its objection to the appeal. In relation to two other questions Waksman J did not give permission.

4. The two surviving questions, for which permission was given, can be summarised as follows: -

   i) Whether an assignee of cargo claims under Bills of Lading (such as the Insurer in this case) can be held liable to pay equitable compensation to the carrier (the Owner in this case) if, in breach of an equitable obligation to arbitrate those claims, the assignee brings proceedings in respect of those claims in a foreign court against a party other than the carrier? ("the Equitable Compensation Question") and

   ii) If so, whether the carrier can rely on the principle of 'transferred loss' , to claim such equitable compensation in respect of legal costs incurred by a third-party (Lavinia) in defending the assignee's claim against it in a foreign court, where the carrier itself was not the Defendant and did not suffer any such loss? ("the Transferred Loss question")

The Equitable Compensation Question

5. Equitable obligations and equitable compensation/damages arise traditionally where there is a trust or equivalent and/or breach of confidence and, as Lord Toulson said, in

AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503 at [76]:"*What has to be identified in each case is the content of any relevant obligation and the consequences of its breach."*

6. It was common ground between counsel that two kinds of equitable obligations were in play in this case: although the definitions they use have no long jurisprudential history. Both of them seemingly derive from the wisdom of Mr Thomas Raphael QC in his work Anti-Suit Injunction (2nd Ed 2019), particularly at paragraphs 10.66ff and 10.81ff, and were given apparently their only judicial airing by Cockerill J in **The Archagelos Gabriel** [2020] 2 Lloyds Rep 317 at [60]:

   i) Derived Rights Obligations (helpfully called DROs in argument) . These arise when a party has a right derived under a contract, e.g. by way of assignment, subrogation or direct action statute, and, if it wishes to exercise such right, can only do so in accordance with the forum clause set out in the contract from which its rights are derived. The word 'inconsistent' is often used in this context, but it means 'inconsistently' with the terms of the contract under which the rights are derived: examples are **The Jay Bola** [1997] 2 Lloyds Rep 279, **The Yusuf Cepnioglu** [2016] 1 Lloyds Rep 641 and **Airbus SAS v Generali Italia** [2019] 2 Lloyds Rep 59. The obligation of the party who is thus 'bound' by such forum clause is often described as an equitable right equivalent to contract (see e.g. per Males LJ in Airbus at [93]-[97]) and by Raphael at 10.19 as a "substantive equitable obligation".

   ii) Inconsistent Claim Obligations (ICOs). These are an equitable obligation on a foreign Claimant not to seek to take the benefit of a contract without the burden of the exclusive forum clause to which that contract is subjected, even in circumstances where the foreign Defendant denies that it is a party to the contract on which it is being sued. Examples are given by Cockerill J in the **Archagelos Gabriel** at [61], including **Dell Emerging Markets v IB Maroc** [2017] 2CLC 417 and **XL Insurance Co SE v Little** [2019] EWHC 1284 (Comm). The basis for it seems, as discussed by Cockerill J, as below, to be the Court's jurisdiction to restrain what is 'vexatious'.

7. Mr Corby submits that these equitable obligations are distinct from others which give rise to equitable compensation or damages, and that such remedies cannot be obtained as a result of a breach of either obligation; but that they are also distinct from each other. He submits that the Arbitrator not only confused contractual and equitable obligations (see paragraph 3 above) but also confused and conflated the Derived Rights Obligation and the Inconsistent Claim Obligation. The Arbitrator rightly considered that where there is a contract between party A and party B containing a forum clause, party C taking under the contract by way of an assignment has an "equivalent equitable obligation" (DRO) not to sue B, otherwise than in arbitration. However, he submits, this does not apply, as the Arbitrator incorrectly found, to where party C sues party D, a non-party. He has no DRO, but may be capable of being enjoined by the court by virtue of an ICO.

8. Mr Wright accepts as a matter of principle the distinction between a Derived Rights Obligation and an Inconsistent Claim Obligation, but submits that the Arbitrator found, and rightly, that he was enforcing a Derived Rights Obligation, that the Insurer (party C) owed to the Owner (party A) an equitable obligation equivalent to contract

not only not to sue party A otherwise than in accordance with the arbitration clause but also not to sue Lavinia (party D) . This was the finding which the Claimant was not given permission to appeal. Mr Wright accepted the distinction between a DRO and an ICO, where there is no derived right and the Court's jurisdiction is based only on 'vexation', but, by virtue of the Arbitrator's unappealed conclusion, that is not this case. He also submits that the Arbitrator had jurisdiction to award damages/compensation for breach of the Derived Rights Obligation which he found.

9. I consider that Mr Wright is correct that Mr Corby is unable to challenge the conclusion by the Arbitrator that the Insurer was in breach of an equitable obligation equivalent to contract when it sued Lavinia. Such conclusion was complicated by the Arbitrator's incorrect conclusion that the Insurer was "*by bringing those proceedings in Spain. In clear breach of the arbitration agreement*" (paragraph 56 of the Award) and perhaps also in not grasping the difference (only now emphasised before me), between a DRO (as exemplified by **Airbus**) and an ICO (as exemplified by **XL Insurance**): but he concluded in paragraph 56 that "*even if it is argued that the cargo insurance claimant was not, in the strict sense, in breach of contract, **Airbus** does clarify that instead the breach...was that of an "equivalent equitable obligation*".” He then concluded at paragraph 58: "*The Owners made the point, with which I agree, that, just as a subrogated insurer takes the 'burden' of an arbitration clause with the 'benefit' of being entitled to sue, so it must follow that if proceedings are brought against a party on that basis, such party is effectively party to the contract and must be sued in accordance with the terms of the contract. I accept the findings of the case referred to by the Owners in **XL Insurance**."*

10. The Claimants formulated their question 3 in their skeleton argument for permission to appeal against the Arbitrator's decision: "*Was the Cargo Insurer in breach of an equivalent equitable obligation to the arbitration agreement in the bills of lading, which obligation it owed to Owners, in commencing the Spanish proceedings against Charterers*?" In that skeleton argument Mr Corby submitted as follows:

> *“ 21…..in order to find that the Cargo Insurer was somehow in breach of an equitable obligation owed to Owners not to bring the Spanish Proceedings against Charterers, the Arbitrator had to expand the scope of the "equivalent equitable obligation" identified in **Airbus**....This was unjustified as a matter of authority.*
>
> ...
>
> *23…. the Arbitrator has mixed up those two principles [the DRO and the ICO] to hold that where a non-party, Party C (the Cargo Insurer) sues another non-party, Party D (Charterers), contrary to an arbitration clause in a contract between Party A (Owners) and Party B the Consignee), that might not just entitle Party D to an anti-suit injunction against Party C (save for West Tankers) but would also amount to a breach of an equitable obligation owed by Party C to Party A. That final leap is unjustified and unjustifiable. Such an obligation did not exist.”*

11. The Defendant opposed the grant of permission. Waksman J refused leave in relation to this question in short compass: "*The... finding that the Insurer was (even if not in breach of the arbitration agreement stricto sensu) in breach of an equivalent equitable obligation was not obviously wrong or seriously open to doubt, given the case-law*."

12. It is therefore not open to the Claimants to challenge the Arbitrator's finding. The Arbitrator found, as derived from the arbitration clause in the bill of lading, whereby "*in case of any dispute English Law/London arbitration to apply*", that the Insurer as assignee (party C) owed an equitable obligation to party A not only not to sue party A otherwise than in accordance with the arbitration clause but also not to sue party D in respect of a dispute falling within the arbitration clause, and his finding cannot be appealed. It may be an extension of the DRO but it is not an extreme or unlikely one, and I reject Mr Corby's submission that it was an impermissible mingling of a DRO and an ICO, given that the *derived* obligation of the Insurer is being enforced.

13. The issue before me is whether equitable compensation is recoverable for breach of such an equitable obligation, being an 'extended DRO'. I do not need to address whether compensation is recoverable in respect of a breach of a simple ICO, and it is common ground between counsel that it is not. Where there are no *derived* rights, claims to enforce forum or arbitration clauses by way of an anti-suit injunction, such as are discussed in paragraph 6 (ii) above, arise from the inherent jurisdiction of the court to restrain vexatious or unconscionable conduct. Thus in **Dell Emerging Markets**, Teare J said at paragraph 34: "*The reason why the jurisdiction clause can be enforced by an injunction .... is that it would be inequitable or oppressive and vexatious for a party to a contract... to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract."* Cockerill J analysed the position similarly in **The Archagelos Gabriel** at [62] to [68]. It can be seen that, given that the basis for the Court's jurisdiction is to restrain the bringing of proceedings which would be unconscionable or vexatious, it is not an obvious candidate for the grant of equitable compensation for breach of obligation. Damages might only arise in the context of damages in lieu of an injunction under s50 of the Senior Courts Act 1981 ("SCA"), the successor to Lord Cairns' Act, if available, to which I shall return. As for the issue whether the Defendant can recover compensation for breach of a DRO owed, as found by the Arbitrator, where the breach consists of party C suing party D, and the equitable obligation is owed to party A, who then complains of its breach, the loss is likely to be suffered by party D, as here, so that the question of transferred loss, to which I shall also return, is usually bound to follow, as it does in this case.

14. I set out below the rival submissions as to the availability of equitable compensation for breach of a Derived Rights Obligation. It is common ground that there has not yet been a case in which any such compensation has been awarded, so this would be the first. It is also common ground that common law damages for breach of contract can be recovered when in breach of the arbitration agreement party B sues party A otherwise than in accordance with the clause, as in **Union Discount Co Ltd v Zoller** [2002] 1 WLR 1517 and **CMA CGM v Hyundai MIPO Dockyard Co Ltd** [2009] 1 Lloyds Rep 213.

15. Mr Corby made the following submissions: -

i) He refers to Meagher, Gummow & Lehane's Equity: Doctrines and Remedies (5th Ed) at 23-010 for the proposition that "*the equitable jurisdiction to award compensation and damages depends on distinct principles that bear out the distinct principles and concerns of equity.*" Thus the principal categories are (a) breach of trust (b) breach of fiduciary duty (c) breach of confidence (d) dishonest assistance of a breach of trust: Snell's Equity at 20-029-033. He submits that it is only *special* (per Viscount Haldane LC in **Nocton v Lord Ashburton** [1914] AC 932 at 955) relationships, akin to trust, which found equitable compensation in the event of a breach. A DRO and an ICO do not constitute such obligations.

ii) The DRO arises, as Lord Hodge analyses it in the **Atlantik Confidence** [2020] Lloyds Rep IR 274 at [27], by way of a constraint on the assertion of an assignee's right through legal proceedings inconsistently with the contractual provision under which the assignee obtains the benefit. It is this inconsistency which is said by Hobhouse LJ in **The Jay Bola** at 286 to be the "*unconscionable conduct*" which justifies the intervention of equity. There is no *special* duty of trust e.g. on a fiduciary, which Mr Corby submits to be necessary to found a remedy of equitable compensation.

iii) He submits that the appropriate analogy is with a restrictive covenant enforceable in equity as in **Tulk v Moxhay** (1848) 18 LJ Ch 83 and **Eastwood v Lever** (1863) 4 de GL &SM 114, where a breach of such a covenant may give rise to a right to injunctive relief (or "statutory" damages under Lord Cairns' Act, now s50 of the SCA) but not to a right to equitable compensation.

iv) Hence it is that not only has there been no reported award of equitable compensation for breach of a DRO, but that in a considerable number of authorities he can find dicta which suggest that such remedy is not available. Thus:

a) In **The Jay Bola** at 286 Hobhouse LJ stated that the "*only remedy is to apply for an injunction to restrain the assignee from refusing to recognise the equity of the debtor. The equitable remedy for such an infringement is the grant of an injunction.*" Mr Corby submits that the exclusion of a financial remedy in cases of breach of an equitable obligation can be contrasted with what Hobhouse LJ had said earlier at 285, as to cases of contractual breach, namely that an injunction would merely be the "*primary remedy*" in that case, and that the aggrieved party "*also has the option to sue for damages for breach of contract*".

b) In **The Charterers Mutual Assurance Association Ltd v British & Foreign and TMM Transcap** [1998] IL Pr 838 at [53] HHJ Diamond QC stated that "*unless the court intervenes by way of injunctive relief the clause will be wholly ineffective and there will be no means of enforcing the...rights under English law."*

c) In **The Yusuf Cepnioglu [2016] 1 Lloyds Rep 641** Longmore LJ stated at [27] that "*the insurers had a right to require arbitration ...which was an empty right unless enforceable by injunction*", and Moore-Bick LJ said at [55] that "t*he commencement of proceedings*

contrary to the arbitration clause .... [would] "*provide sufficient grounds for the court's intervention by way of the equitable remedy of an injunction*". Neither of the Lords Justices suggested the availability of any other equitable remedy.

d) In **West Tankers Inc v Ras Riunione Adriatica Di Sicurta** [2005] 2 Lloyds Rep 257 at [71] Colman J held that breach of what was a DRO, although not an "*actionable breach of the agreement to arbitrate.. gives rise to a right of protection by way of injunctive relief under English law*".

e) In **Airbus** at [93]-[96] Males LJ cited Colman J with approval, and in summarising the consequences at 96(3) stated "*the remedies available in such a case include the grant of a declaration in an appropriate case*". He did not mention damages or compensation.

f) Mr Corby cites Raphael at 14.42-44 in relation to an ICO to the effect that "*If there is a general substantive equitable obligation not to commence vexatious and oppressive or unconscionable litigation abroad which is capable of supporting such a claim for compensation, it is a shy creature. There is no reported case where compensation or damages have even been sought in equity in respect of such wrongful foreign litigation independent of Lord Cairns' Act; and there is no principle of the traditional rules of equity on which a general claim for compensation could be faced. The historical development of the anti-suit injunction is difficult to reconcile with the existence of a general claim for compensation or damages*".

v) Anticipating two of Mr Wright's submissions, which he had made in his skeleton argument in opposition to permission to appeal: -

a) As to the Defendant's submission that if an injunction were not an available remedy by virtue of **West Tankers v Allianz SPA** [2009] ECR I -663, compensation must be available, or otherwise the injured party would be left without a remedy, Mr Corby submits first that the party could seek an injunction from the arbitrator under s66 of the Act, which would not be prevented by **West Tankers**, and secondly that Henshaw J suggested in **The Prestige (No. 3)** [2020] 2 Lloyds Rep 223 at [203]-[206] that **West Tankers** might not prevent the recovery of damages in lieu of an injunction.

b) As to Mr Wright's reliance upon obiter comments of Flaux J in **The Front Comor** [2012) 2 Lloyds Rep 103 at [77], that he could see that "*there would be a strong case for awarding damages for breach of a duty to arbitrate*", Mr Corby responds that, when Flaux J referred to equitable damages, he was referring not to equitable compensation but to damages under Lord Cairns' Act, to which he had expressly referred earlier at [63], namely to the "*statutory power under section 50 of the Senior Courts Act 1981 to award equitable damages".*

16. The response of Mr Wright on behalf of the Defendant is as follows: -

i) He agrees that it is necessary, as per Snell's Equity at 20-029, "*to begin analysis by correctly identifying the content of the duty that has been breached*", but, as Snell there records, "*The principles are still being worked out*" or, as Mr Wright put it, the law has moved on from **Nocton v Lord Ashburton,** and the categories of breaches of obligation for which equitable compensation can be awarded are not closed. Insofar as a pre-existing relationship is required, there is sufficient of a pre-existing relationship by reference to the pre-existing contract under which the assignee took the rights with which he is now acting inconsistently. Whereas Mr Corby referred to the passages in Raphael in which an ICO was being addressed, Mr Wright refers to the subsequent passages, in which Raphael is specifically addressing a DRO, at 14.48-49: -

> *"The landscape may be different in relation to specific equitable relationships which have a concrete existence independent of anti-suit injunctions and claims for damages, such as the equitable relationship which links an assignee of a contract to the debtor under the contract, or the subrogated insurer's relationship to the defendant to the subrogated claim.*
>
> ...
>
> *In particular in the assignment situation, there would be a credible argument that the assignee's equitable obligation not to claim the substantive rights under the original contract without respecting the exclusive foreign clause to which those rights are inherently subject should be capable of supporting a claim for equitable compensation. If damages were not available in such a situation, it would be easier to weaken the force of an exclusive forum clause by assigning a contract to another linked party. It seems quite likely, therefore, that a remedy in damages or compensation will be held to exist through one analysis or another, and that failing a direct contractual claim, liability will be justified either on the basis that there is a claim for compensation in equity or on the basis the assignee is precluded by equity from denying his liability in contractual damages".*

ii) Mr Wright draws attention to the passage in Raphael at 10.19 where he addresses the nub of the DRO:

> "*The authorities are not definitive in this regard, although the bulk of the current case law appears to be best explained on the basis that the positive obligation binding on the third-party is a substantive equitable obligation, binding a third-party not to seek to take the benefit of a contract without the burden of the exclusive forum clause to which that contract is subjected, which arises because it would be unconscionable, or contrary to good conscience, for the third-party to seek to do so. This specific equity differs from the debatable general equitable rights and obligations which may (but may not) underlie non-*

contractual anti-suit injunctions in general, as it means the third-party is "bound" to respect the clause. It is distinct from any such general equitable obligations and it may exist even if they do not."

Mr Wright submits that this "*substantive equitable obligation*" is of a kind which justifies the existence of a remedy of equitable compensation.

iii) There is also, Mr Wright submits, a justification by reference to the terms of s82(2) of the Act, whereby a "*party*" to arbitration includes "*any person claiming under or through a party to the agreement*". He points both to Russell on Arbitration (24th Ed, 2015) at para 3-031 and Merkin on Arbitration Law para 7.7.1 in support of the proposition that this has the effect of meaning that an assignee is "bound by the arbitration agreement", in the sense that the assignee is not a party to the agreement but is bound to honour it in equity. Hence it should be liable to pay equitable compensation for breach of that obligation. Mr Corby refers to **The Prestige (No. 3)** at [57]-[60] and Henshaw J's citation of Hamblen J in **The Prestige (No 2)** [2015] 2 Lloyds Rep 33 at [136] that a third party claiming under or through a party to an arbitration agreement is not a "*party to the agreement in the full sense*": but Mr Wright points to **The Atlantik Confidence** at [27] to support his proposition that the assignee becomes a party to the extent that it cannot enforce its *derived* right without the concomitant obligation to arbitrate and to that extent becomes bound.

iv) Mr Wright submits that reference to **Tulk v Moxhay** is inapt because the ratio of the rule in that case, as explained in **Rhone v Stephens** [1994] 2 AC 310 at 317C-F, is that the owner of land subject to the restrictive covenant had never acquired a right to use it in a manner inconsistent with those covenants and so could not grant any such rights to a subsequent purchaser, such that compensation for loss did not arise.

v) He submits that the rationale behind the existence of the DRO militates in favour of its being one for which there is a monetary remedy. He submits that the DRO arises as a result of the 'benefit and burden' principle (e.g. **The Jay Bola** at 286) or 'conditional benefit' (Chitty on Contracts 33rd Ed 2020 at 19 - 080), and there is no logical reason why the burden or condition should be limited by an obligation which does not sound in compensation. It would not then be an obligation "equivalent to contract" (e.g. per Males LJ in **Airbus**). In any event he submits that there is no reason why damages should not be recoverable, just as upon a breach of the 'equivalent' contractual obligation, including, as in **CMA**, recovery of the whole of the judgment debt in the impugned foreign proceedings.

vi) The absence of a right to recover compensation could lead to the prospect of abuse, pointed out by Raphael at 14.49, by a party assigning its rights to an assignee so that the assignee could sue in the non-contractual forum without risk of compensation. It would, as Mr Wright points out, also give the opportunity for impermissible forum shopping by a party with a DRO.

vii) Finally Mr Wright submits that the availability of relief for breach of the DRO should not depend upon the availability of an injunction, and should not stop at a declaration, which may have no impact. The claim for breach of the contractual obligation, to which the equitable obligation is said to be equivalent, is not so limited. An injunction may not be available, as in **West Tankers**, or may not be of any effect: and an injunction by an arbitrator under s66 may not be recognised. Commercial or time pressure may not permit an injunction or it sometimes may be more appropriate to attempt a strikeout application rather than an immediate injunction, as in **Union Discount**. Damages in lieu of an injunction under s50 of the SCA may not be available (of which more later).

17. The case made by Mr Wright is a powerful one, and he submits that there is nothing in the authorities cited by Mr Corby to stand in his way, or hence in mine:

i) As to Hobhouse LJ in **The Jay Bola** at 286, no case was being made before him for recovery of equitable compensation, and Sir Richard Scott VC at 291 does not seem, when agreeing with Hobhouse LJ, to have read his statement as predicating an injunction as being the exclusive remedy, because he said "*I agree with Lord Justice Hobhouse that DVA's remedy is, prima facie*,[my underlining] *the grant of an injunction to restrain the attempt"*.

ii) Whereas Mr Wright recognises that, in the passages cited from the judgments of HHJ Diamond QC in **Charterers Mutual** and Longmore LJ in **Yusuf**, both judges referred to the clause being ineffective or the right being empty without the availability of an injunction, he submits that there is no reason to conclude that they were thereby ruling out the remedy of damages, and similarly so in respect of Moore-Bick LJ.

iii) He submits likewise that there is no reason to conclude that Colman J in the passage which Mr Corby cites from his **West Tankers** judgment was limiting the relief available to an injunction, when he notes that Males LJ in **Airbus**, while approving Colman J's dictum, went on to record at 96(3) the availability of a declaration in an appropriate case.

iv) Males LJ's statement was plainly not exclusive, in terms of ruling anything out: "*The remedies available in such a case include the grant of a declaration in an appropriate case*".

18. On the other hand: -

i) In the passage referred to in **The Front Comor**, Flaux J stated at [77] in relation to what was a breach of a DRO by subrogated insurers; "*it seems to me there would be a strong case for awarding damages for breach of the duty to arbitrate*". Raphael at 14.50 considers it more likely that he was not referring to s50 damages.

ii) Finally, and most recently, Henshaw J in **The Prestige (No.3)** at [209ff] refers to the "*non-exhaustive nature*" of the reference in **Airbus** to the available remedies, and cites Raphael at 14.41 to the effect that: *"Monetary compensation (and possibly damages in equity) can be awarded in equity for*

> *infringements of equitable rights, independent of section 50. In principle therefore, compensation could be awarded in respect of foreign litigation that breached an equitable obligation not to pursue such litigation abroad*." At 211 Henshaw J refers to the passages in Raphael at 14.48 and 14.52, part of which I have cited in paragraph 16 above, as being consistent with Flaux J's decision in **The Front Comor**, and concludes that the Club had a good arguable case for equitable compensation - "*a good example of a complex and novel point of law",* which he said he did not have to resolve, but I do.

19. In my judgment, the submissions of Mr Wright are cogent and persuasive, and unless I am prevented from concluding that there should be equitable compensation for breach of a DRO, including this 'extended DRO', irrespective of and additional to the remedies of injunction or declaration, I would so conclude. I am satisfied that for, all the reasons he gives, which I have set out above, logic and equity reach the same conclusion and there is no authority which deters me from it. Accordingly I consider that the Arbitrator, albeit without the benefit of the detailed arguments that have been set out before me, was right to come to the conclusion that he did.

The Transferred Loss Question

20. The question for which permission was given is "*whether* [the Defendant] *was entitled to recover damages in respect of the loss suffered by* [Lavinia] *under the principle of ' transferred loss', on the basis that* [the Defendant] *and* [Lavinia] *were closely related companies*." The Arbitrator did not make a finding that Lavinia had been sued in Spain as the Defendant's agent, though the Defendant has served a Respondent's Notice in that regard in which they rely on the decision in **The Hornbay** [2006] 2 Lloyds Rep 44.

21. The principles of transferred loss were addressed most recently by the Supreme Court in **Swynson Ltd v Lowick Rose LLP** [2018] AC 313. Lord Sumption describes it in this way at [14]:

> *"The principle of transferred loss is a limited exception to the general rule that a claimant can recover only loss which he has himself suffered. It applies where the known object of a transaction is to benefit a third-party or a class of persons to which the third-party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party."*

In **BV Nederlandse Industrie v Rembrandt Enterprises Inc** [2020] QB 551 Coulson LJ said at [72] that *"the known third party benefit is an essential component"* and at [73] that there must be *"a common intention and/or a known object to benefit the third-party or a class of persons to which the third-party belonged"*.

22. The Arbitrator found at paragraph 58 of the Award that "*I further find, and accept, on the basis of the evidence provided, that Lavinia were a closely related company to the Owners (being Owners' managers) and were, therefore, fully entitled to rely upon the wide wording of the arbitration agreement*."

23. It is common ground that in addition to the "*known object*" requirement, it is, per Lord Sumption at [16] an essential feature of the principle that it only applies so as "*to avoid a "legal black hole", in which in the anticipated course of events the only party entitled to recover would be different from the only party which could be treated as suffering loss*", so that "*it is not available if the third-party has a direct right of action for the same loss, on whatever basis*".

24. A preliminary point is taken by Mr Corby that there seems to be no reported case in which the principle is being applied other than in contract, and most of the words used by the judges in **Swynson** and in **Rembrandt** are couched in relation to a contract, because both those two cases related to claims for breach of contract. However the words of Lord Sumption at [14] set out above, quoted by both counsel as crystallising the principle, do not refer to contract but to the "*known object of a transaction*" and the "*anticipated effect of a breach of duty*". I can see no basis upon which, once the principle exists, it needs to be limited to contract, particularly where the equitable obligation is "*equivalent to contract*".

25. Mr Corby submits that the reasoning of the Arbitrator was insufficient, because it cannot be enough for the principle to apply that Lavinia was "*a closely related company*". He also submitted that it is not enough, as Jacobs LJ put it in **SmithKline Beecham plc v Apotex Europe Ltd** [2007] Ch 71, to be one who might be adversely affected by the breach of contract. However it is far from clear that such a dictum (considered by Coulson LJ in Rembrandt at [68]) imposed a limit on the concept of '*known object"*, particularly in the light of his statement at [71] that known object, which must obviously include an intention to benefit and also an intention not to harm or cause detriment extends to "*a class of persons to which the third party belonged*" (echoing the words of Lord Sumption set out above). It is however plain that the Arbitrator concluded that Lavinia was a "*known object*", in the sense that a breach of the DRO in question by the Insurers as assignee, if they sued a third party such as Lavinia in breach of their DRO owed to the Defendant, would lead to harm or detriment to Lavinia. Mr Corby drew attention to the decisions of Mr Laurence Rabinowitz QC in **Team Y & R Holdings Hong Kong v Ghossoub** [2017] EWHC 2401 and Mr Andrew Burrows QC in **Clearlake Shipping v Ziang Da Marine Pte Ltd** [2020] 1 AER (Comm) 61, as to the question of construing an exclusive jurisdiction clause (analogous to an arbitration clause) as to whether or not it covered claims against non-parties. The Arbitrator's finding of *closely related company* is perhaps an unconscious echo (**Clearlake** was not cited) of one of the factors identified in **Clearlake** at [37(iii)] ("*a close relationship*") which can extend the ambit of protection of a jurisdiction clause. However, I am satisfied that this issue is no longer open to Mr Corby to probe. The Arbitrator held that, upon its proper construction, the arbitration agreement extended to Lavinia. This means that the parties must have intended the arbitration agreement to extend to claims made under the bills of lading against Lavinia. Lavinia therefore clearly derive benefit from the arbitration agreement, on the finding of the Arbitrator. Permission was not granted to the Claimants to pursue their question 3, set out in paragraph 10 above, namely whether the Insurer was in breach of an equivalent equitable obligation to the arbitration agreement owed to the Defendant in commencing the Spanish proceedings against Lavinia. To argue the contrary now is not open to the Defendant. The result is therefore the same as in **The Hornbay** and **Dell v Emerging Markets,** where injunctions were granted to restrain proceedings against non-parties to the relevant

forum clauses, although in both cases there were more facts than simply the non-party being a closely related company, which was all that the Arbitrator found. Nevertheless it is not now open to challenge the finding of the Arbitrator, and I have concluded earlier that damages are recoverable by the Defendant by virtue of the breach of the DRO owed to it, constituted by the Insurer suing Lavinia. I do not therefore need to consider the agency argument raised in the Respondent's Notice.

26. The outstanding issue therefore is whether the loss suffered by Lavinia has indeed fallen within a black hole and is lost unless the principle of transferred loss can enable the party to whom the DRO is owed, namely the Defendant, to recover that loss. If Lavinia were the claimant, it would be likely that it could have obtained an injunction, as in **Dell v Emerging Markets**, where both Dell UK and Dell Maroc obtained an anti-suit injunction, Dell UK by way of enforcing its contractual right and Dell Maroc by way of an ICO, because it would be "*inequitable or oppressive and vexatious*" to seek to enforce the claim without respecting the jurisdiction clause within the contract. Lavinia may be, as I have found, a *known object* or one of a class of known objects of the equitable obligation owed to the Defendant by the assignee Insurer, but it had no derived right itself, and no DRO was being enforced. Hence its only right would be to enforce an ICO, and both counsel agree with the views of Raphael at 14.42ff (see paragraph 15 (iv) (f) above) that "*if there is a general substantive equitable obligation not to commence vexatious and oppressive or unconscionable litigation abroad which is capable of supporting a claim for compensation, it is a shy creature*" and "*Even if there is a substantive equity it does not follow that it is an equity which supports a cause of action for equitable compensation or damages. Further if a general equitable right to compensation were to exist, it would confront and create serious problems*", which he sets out (proceeding in the following passages to contrast the position of DROs, which I have considered exhaustively above). There is therefore agreed to be no equitable compensation available to Lavinia in suing on an ICO, based simply upon proceedings brought against it vexatiously or unconscionably.

27. However the issue is then raised by Mr Corby as to whether Lavinia would be entitled to s50 damages in lieu of an injunction. If such damages would be available to Lavinia then there would be no black hole or inability to recover. In **The Prestige (No. 3)** Henshaw J pointed out at [204] that Flaux J had considered (obiter) in **The Alexandros T** [2014] 2 Lloyds Rep 579 (a DRO case) that s50 damages might have been recovered even though the grant of an injunction would have been unlawful at EU law. He consequently concluded at [206] that the Club had *"a good arguable case that the arbitrator would have power to award damages in lieu of or in addition to an injunction*". The view of Gee on Injunctions (7th Ed 2021) at 14-082 is that "*The power to award damages in substitution for an injunction applies to cases in which an application for an injunction can be entertained by the court….The damages to be awarded under s50 are compensatory for loss* ". He concludes that there is no scope for damages under s50 against defendants covered by the Brussels-Lugano regime, which, whatever may be the position in the future, was the case at the time of these proceedings. Raphael, however, at 14.54 to 14.57, after exhaustive consideration of authorities in a footnote, concludes with specific reference to an ICO, that *" there is a real argument that it would be wrong to award damages in lieu of an injunction if not only is there no common law cause of action but there is not even an underlying substantive equitable right that could sound in damages. ….it is uncertain whether*

section 50 Senior Courts Act 1981 provides a useful route to claim damages in respect of supposedly wrongful foreign litigation".

28. The Arbitrator made no findings as to whether the *'blackhole'* applied. He referred at paragraphs 17-19 (and again at 33) of the Award to **Swynson** and at paragraph 19 to the legal blackhole, but it appears to have been assumed that Lavinia would have no ability to recover the costs. Given the considerable uncertainty even before me as to the availability of the remedy of s50 damages in lieu of an injunction, had Lavinia sought one, I am not satisfied that the principle of transferred loss, otherwise applicable, has been excluded.

Conclusion

29. I therefore dismiss this appeal.