Case No: 2010 Folio 1203

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

Royal Courts of Justice
Strand, London, WC2A 2LL

11 February 2011

BEFORE:

THE HONOURABLE MR JUSTICE ANDREW SMITH

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BETWEEN:

STAR REEFERS POOL INC

Respondent/
Claimant

- and -

JFC GROUP LTD

Applicant/
Defendant

- - - - - - - - - - - - - - - - - - - -

MR PETER STEVENSON (instructed by Messrs Swinnerton Moore) appeared on behalf of the Applicant

MR CHARLES KIMMINS QC and MR LUKE PEARCE (instructed by Stephenson Harwood) appeared on behalf of the Respondent

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Approved Judgment

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MR JUSTICE ANDREW SMITH:

1. This is an application by the defendant under Part 11.1 of the CPR for orders declaring that the court has no jurisdiction to try this action or that the court will not exercise its jurisdiction to try it.

2. The claimant obtained permission to serve process out of the jurisdiction on the grounds, first, that the relevant contract was made by or through an agent trading or residing in the jurisdiction; and, secondly, or alternatively, that the claim is in respect of a contract that is governed by the law of England and Wales. The claimant does not now contend that the former is a proper basis for jurisdiction; they rely upon the latter. The defendant's argument is that the claimant is not entitled to do so because on a proper interpretation of the Rome Convention the law of the putative contract is Russian. The defendant also submits that, if the proper law is English, then Russia is the proper and appropriate forum and permission to serve out of the jurisdiction should be set aside.

3. The claim is for about US $13.3m said to be due under guarantees. The defendant is a Russian company in the business of importing and distributing fruit in Russia. Its registered offices are in St Petersburg. Its operations are managed from Russia. Its senior staff reside in Russia and, I would infer, are likely to be or likely predominantly to be Russian speakers.

4. The claimant is a Cayman Island registered company, operating and chartering reefer vessels. By two charterparties dated 4 April 2008 and 15 July 2008, the claimant chartered three vessels, the “Almeda Star”, the “Avelona Star” and the “Cape Town Star”, to a third party Kalistad Limited ("Kalistad"), a Cypriot company. It is clear there is a close connection between Kalistad and the defendant and it appears that Kalistad is a company through which the defendant imports fruit to Russia.

5. The charterparties included provisions that "any dispute arising thereunder shall be referred to arbitration in London (English law to apply)". They also provided that Kalistad's obligations under the charterparties were to be guaranteed by the defendant.

6. The defendant was closely involved in the negotiations of the charterparties. Negotiations on behalf of Kalistad were conducted at least for the most part by Mr Dennis Rodnov, who was the chartering manager of the defendant. The charterparties were entered into by Kalistad for the defendant's benefit and use.

7. As I have indicated, it was a term of the charterparties that the defendant should provide a guarantee of charterer's obligations. The evidence before me is that that was a requirement of the claimant. Although the charterparties provided for the charterer's obligations to be guaranteed in this way, it is not

suggested that the charterparties themselves were contracts of guarantee or that the defendant was a party to them.

8. The claimant's case is that guarantees were provided or recorded in letters sent in October 2008 by the commercial director of the defendant, a Mr Andrey Afanasyev. They provided as follows:

> "We refer to the time charter between Star Reefers Pool Inc and Kalistad Limited... We hereby certify that our company guarantees the performance of the charterparty... for the account of our Nominee, Kalistad Limited, Nicosia."

The use of the expression "our Nominee", chosen by the defendant, is of some importance. The letters recording the guarantees did not refer to the proper law to be applied to them or their construction, nor for that matter was there any jurisdiction or arbitration provision.

9. When disputes arose under the charterparties on 12 March 2010 the claimant brought arbitration proceedings in London against Kalistad for unpaid hire and damages for early re-delivery and on the same day brought arbitration proceedings in London against the defendant. The defendant, by email on 26 March 2010, disputed the jurisdiction of the arbitrator appointed by the claimant on the basis there was no arbitration agreement between the parties.

10. The defendant then on 23 June 2010 brought proceedings in the Commercial Court at St Petersburg seeking a declaration that the guarantees were not binding agreements between the parties.

11. These proceedings were brought by the claimant on about 13 October 2010 and a declaration was sought that the defendant is liable to pay such damages as may be awarded by the claimant in the arbitration against charterers. Shortly after they were issued, the claimant obtained permission to serve the claim form on the defendant out of the jurisdiction in Russia. The claim form was served on 20 October 2010. Acknowledgment of service was filed on 8 November 2010 and by that acknowledgment the defendant indicated an intention to contest the jurisdiction.

12. The claimant, as well as seeking and obtaining permission to have the claim form served out of the jurisdiction, sought an anti-suit injunction for an order prohibiting the defendant from pursuing the proceedings in St Petersburg. That application was granted by Christopher Clarke J and it was upheld and continued by Teare J on 8 November 2010, when he dismissed the defendant's application that the injunction should be discontinued. He rejected arguments that the court did not have jurisdiction to grant the injunction and rejected the argument that the proceedings in St Petersburg were not vexatious or oppressive.

13. It is not said that Teare J's judgment gives rise to any *res judicata* or issue estoppel. I am prepared to proceed on the basis that I should look at the matter myself *de novo*, as the defendant submits that I should.

14. There were two questions, therefore, for me to decide. Firstly, whether there is a good arguable case - the test is that – that the claim falls within one of the categories of cases stated in CPR 6B Practice Direction to give grounds for the court to permit the service of proceedings outside the jurisdiction. That depends upon the proper law of the guarantees. Secondly, whether England is the proper place for the claim to be heard.

15. As far as the first issue is concerned, it is common ground that the governing law of the guarantees is to be determined by applying the provisions of the Rome Convention. The claimant contends that it is governed by English law by virtue of the provisions of Article 3 of the Convention. In the alternative the claimant relies upon Article 4.

16. Article 3 provides as follows:

> "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case..."

17. The guarantees, as I said, did not include any express choice of law. The claimant says that the parties' choice was demonstrated with reasonable certainty, in view of the express choice of English law in the charterparties and the circumstances in which the charterparties and the guarantees were concluded.

18. The claimant relies upon authorities decided when common law rules determined the governing law of a contract to the effect that it was often to be inferred that a guarantee was to be governed by the same law as the contract giving rise to the primary obligations - Broken Hill Pty Co Ltd v Xenakis [1982] 2 Lloyd's Law Reports 304; Mitsubishi Corporation v Alafouzos [1988] 1 Lloyd's Law Reports 191. They also referred to recent cases decided under the regime of the Rome Convention to similar effect - Emeraldian v Wellmix Shipping, [2010] 1 CLC at 393; Golden Ocean v SMI, [2011] EWHC (Comm) 56. Mr Peter Stevenson, who presented the defendant's arguments as attractively as they could be presented, persuasively distinguished the latter of these two recent authorities and submitted that the former was erroneously decided; the judge's attention not being drawn to the differences between the common law regime and the test required by the Rome Convention. He also properly pointed out that the common law authorities, authoritative though they undoubtedly were under the common law regime, are no longer to the point because the Rome Convention requires the court to apply a different test. There I see force in Mr Stevenson's argument.

19. The claimant observed that in this case there was a particularly close connection between the charterparties and the guarantees and between the charterers and the guarantors. I need refer only to three points that they make. First, the closeness of the connection between the defendant and Kalistad: Kalistad was effectively the nominee company of the defendant and that is how the defendant chose to describe them in the guarantees themselves; the

defendant engaged in negotiations with the charterparties and agreed their wording; and copies of the charterparties were sent by the claimant to the defendant rather than Kalistad in order for them to be signed by the charterer. (The defendant was heavily involved in the performance of the charterparties, voyage and carriage instructions being given by them and not by Kalistad. But this consideration does not seem to me crucial. Those matters postdate the guarantees and are not in point determining their proper law. I do not place any reliance upon them.)

20. The second point that the claimant makes with regard to the close connection between the charter parties and the guarantees is that a provision in the charterparties themselves required that the guarantees be given.

21. Thirdly, the claimant observes that the defendant had previously entered into an agreement with Kalistad dated 1 November 2006 and that this was expressed to be governed by English law. The vessels chartered under the March 2010 charterparties were hired pursuant to that agreement.

22. Against this argument, Mr Stevenson made a submission along these lines. Article 3 of the Rome Convention is about express choice of law by the parties or about choice of the parties demonstrated with reasonable certainty. While it is not disputed that under the common law rules an inference would have been drawn in such circumstances as these that the guarantee was governed by the same law as the primary contract, that was because the parties' choice would have been inferred on the basis that the law of the primary contract was the law with the closest and most real connection to the guarantee contract. Article 3 requires a different test be applied. Under the wording of Article 3 the court's role is not to imply a choice from the law with the closest connection, but to discern a choice demonstrated with reasonable certainty in the circumstances of the case. The Giuliano-Lagarde Report points out that Article 3 does not permit the court to infer a choice of law that the parties might have made where they did not have a clear intention to make the choice. Mr Stevenson cites the authority of Hobhouse LJ's judgment in Credit Lyonnais v New Hampshire Insurance Company [1987] CLC 909 at 914 to support his argument that, in interpreting the Rome Convention, the court will be wary of adopting a construction deriving from English law concepts that are not within the scheme of the Convention.

23. I accept that part of Mr Stevenson's submission. However, it seems to me that on the facts of this case the application of the test in Article 3 compels the conclusion that the parties' choice of English law as the proper law of the guarantees is demonstrated with reasonable certainty. Indeed, as Mr Stevenson acknowledged, an example given in the Giuliano-Lagarde Report of circumstances where a choice not expressly made may be demonstrated as the article requires is where there is an express choice of law in related transactions between the same parties. Of course, in this case the parties to the charterparties and the guarantees are not the same and in some circumstances it might be, as Mr Stevenson submitted, that a difference between the parties to the related contracts will be a persuasive reason for distinguishing a case from the example in the Report. But here the charterers

and the guarantors are so closely related and the defendant's involvement in the charterparties was such that to my mind there is no sensible basis for distinguishing the circumstances of this case from the exemplar circumstances in the Report. After all, the Report purports only to give examples of circumstances in which the choice of law, though not express, is sufficiently demonstrated. It does not define or limit them.

24. I, therefore, conclude that the claimant has a sufficient case for the purposes of establishing jurisdiction; a good arguable case that the guarantees are governed by English law. In view of this conclusion, I do not need to consider the alternative submission of a case based upon Article 4 of the Convention.

25. This leads to the second issue: is England the appropriate forum? It seems to me that it clearly is. The likelihood that English law governs the guarantees is not determinative, but it is certainly significant. The documents are in English and will not need to be translated if the litigation proceeds here. It is convenient that any litigation should take place in England because since the underlying dispute is to be arbitrated here, any dispute about the guarantee can deploy the same lawyers and experts.

26. The only connection with Russia is that the defendant is Russian and resident in Russia. It is said that there might be a question about the capacity of those giving the guarantees, but there is no evidence supporting that suggestion. On the face of it, it is difficult to understand how such an argument could be advanced. But even if it were advanced, in my judgment it would not outweigh the other considerations pointing towards England as the appropriate and convenient forum.

27. For those reasons, I dismiss the application.