Case No: A3/2010/3022

Neutral Citation Number: [2012] EWCA Civ 14
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE TEARE
2010 FOLIO 1230

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE SULLIVAN
and
LORD JUSTICE LEWISON

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Between :

STAR REEFERS POOL INC.	**Claimant / Respondent**
- and -	
JFC GROUP CO. LTD.	**Defendant / Appellant**

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- -

Mr Steven Gee QC and Mr Peter Stevenson (instructed by **Messrs Swinnerton Moore LLP**) for the **Appellant**
Mr Charles Kimmins QC and Mr Luke Pearce (instructed by **Messrs Stephenson Harwood**) for the **Respondent**

Hearing dates : Thursday 6th October 2011

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Judgment

Lord Justice Rix :

1. This appeal is against the judge's grant of an anti-suit injunction of proceedings in Russia. The appellant, JFC Group Co Ltd ("JFC"), defendant below, is a Russian company which has brought proceedings in Russia for a declaration that it is not bound under two guarantees which the respondent, Star Reefers Pool Inc ("Star Reefers"), a Cayman Islands company, claimant below, relies upon. Indeed, since the grant of the injunction by Teare J in his judgment and order dated 23 November 2010, Star Reefers has obtained summary judgment against JFC under the guarantees in the sum of just over $16 million. That was in the absence of any defence from JFC, which, having lost its challenge to the English court's jurisdiction, has not entered an appearance in these proceedings.

2. The essential question which arises on this appeal is whether Teare J was right to say that JFC's Russian proceedings were vexatious or oppressive. It is suggested on behalf of Star Reefers that that finding was an exercise in discretion, and that no effective appeal can be mounted against it. In my view, however, such a finding is an evaluative judgment, and a condition precedent to the grant of any injunction in such a case as this, where no exclusive English jurisdiction or arbitration clause has been agreed between the parties. In this respect it is analogous to the concept of abuse of process: see *Aktas v. Adepta* [2010] EWCA Civ 1170, [2011] 2 WLR 945 at [53]. In both cases, those of vexatious or oppressive conduct and abuse of process respectively, an evaluative assessment has to be made, which is not an exercise of discretion but a matter on which there is, in theory, a right or wrong answer. If the answer is that such conduct exists, there then arises a question of discretion as to whether an injunction against foreign proceedings in the one case, or a stay of domestic proceedings in the other case, will be granted. It may be of course that the finding of vexatious conduct or of an abuse of process carry the court almost the whole way to its decision to grant an injunction or a stay: but that does not affect the fact that the prior finding is not itself an exercise of discretion. Factors which may come in at the second, discretionary, stage in the context of an anti-suit injunction include the important matter of comity.

3. Of course, the finding of an experienced judge of the commercial court that there has been vexatious conduct (I will adopt that shortened expression) is entitled to proper respect, and if it involves an assessment of a large number of factors may for that reason be hard for an appellate court to dislodge. However, it is a serious finding, reflecting a view of what is to count as unacceptable behaviour in the sphere of international litigation. Moreover, in the typical case, such as this, all the evidence is documentary. In such circumstances, this court is entitled to conduct a serious review of the issue.

The underlying transactions

4. Star Reefers is a ship owner, and JFC is an organisation which charters ships. It acts through nominee companies. In the present case it acted through a Cypriot company, Kalistad Limited, but the negotiations were conducted by JFC itself. Star Reefers required JFC to guarantee the chartering obligations of its nominee.

5. We are concerned with two charterparties which Star Reefers made with Kalistad. Under one, dated London, 4 April 2008, Star Reefers time chartered two vessels out of *Almeda Star*, *Avelona Star* and *Andalucia Star* to Kalistad for 36 months. Under the other, dated London, 15 July 2008, Star Reefers chartered one vessel out of *Polar Class*, *Durban Star* and *Cape Town Star* to Kalistad, also for 36 months. In each case the box which named Kalistad as charterer also contained the following: "Due performance of this Charter party in [sic] guaranteed by JFC in every way". The charterparties each contained a London arbitration clause ("English law to apply"). However, JFC did not sign the charterparties, and it was accepted before Teare J by Star Reefers that JFC is not a party, as guarantor, to the charterparties or to their arbitration clauses.

6. Instead the guarantees upon which Star Reefers has relied in this litigation were contained in two letters signed on behalf of JFC, undated, but stamped as received by Star Reefers on 13 October and 19 November 2008 respectively. The letters referred to the respective charterparty and said –

> "We herewith certify that our company guarantees… performance…for account of our Nominee, Kalistad Limited, Nicosia."

The text of the guarantees had been negotiated between the parties. Star Reefers had earlier sent copies of the charterparties to JFC for signature. Copies of the agreed text of the guarantee letters accompanied the charterparties, but the covering letters did not refer to them.

7. On 1 April 2009 Kalistad emailed Star Reefers with respect to a third charterparty (also with its guarantee letter) in relation to an off-hire dispute. There was an issue about the need for security, which Kalistad rejected, saying "Owners have the guarantee from JFC for performance of obligations under the charterparties". Although the email was signed for Kalistad, it was written by a member of JFC's legal department, Mr Dmitry Kasatkin. Star Reefers relies on this email as evidence of JFC's acceptance at that time of the validity of the guarantees.

8. Later, Kalistad fell behind in its hire payments of the chartered vessels. It said that it faced "difficulties because the number of ships under its control turns out to be

excessive in current adverse difficulties". On 23 February 2010 Star Reefers wrote to JFC asking whether, as guarantor, it would confirm that it was willing for Star Reefers to extend concessions to Kalistad. It received no reply. So, on 12 March 2010 Star Reefers commenced arbitration in respect of unpaid hire against both Kalistad and JFC, calling on each of them to appoint their arbitrators. On 26 March 2010 JFC replied through its London solicitors, disputing that it was a party to the charterparties or their arbitration agreements, but otherwise saying nothing expressly about the guarantees. However, it appointed its arbitrator without prejudice.

9. There was a meeting between the parties in St Petersburg in early June 2010. It is said that JFC did not then question the validity of the guarantees or refer to the possibility of imminent Russian proceedings.

JFC's Russian proceedings

10. However, on 23 June 2010, without prior warning by way of a letter before action, JFC commenced proceedings in Russia in which it sought declaratory relief to the effect that the guarantees were ineffective because its letters were an offer to which it had received no reply from Star Reefers by way of acceptance. JFC's claim form cited extracts from the Russian Code to the effect that under Russian private international law the international transactions of a Russian party were governed by Russian law, and that under Russian law JFC's offers of guarantee had not been accepted.

11. JFC did not at that time, however, serve its claim form on Star Reefers. On 6 July 2010 the Russian court stayed JFC's claim in the absence of proof of service. The Russian court next fixed a hearing for 6 September 2010. On that day JFC demanded judgment on its claim, but the court refused, because it was not satisfied that service had yet been made. It appears that Star Reefers received notice of the claim on the next day.

12. On 15 September 2010 Kalistad purported to redeliver the vessels on the ground of Star Reefers' repudiation of the charterparties. In turn Star Reefers accepted Kalistad's conduct as repudiatory and terminated the charterparties. On 23 September 2010 Star Reefers' London solicitors wrote to JFC asking that the Russian proceedings be withdrawn as being vexatious and oppressive. There was no response to that and further letters.

Star Reefers' English proceedings

13. On 13 October 2010 Star Reefers commenced these proceedings, seeking payment under JFC's guarantees of unpaid hire and damages for repudiation of the charterparties. On 15 October 2010 Star Reefers obtained without notice to JFC an anti-suit injunction which ordered JFC not to pursue nor to take any further steps in its Russian proceedings.

14. On that occasion Christopher Clarke J gave Star Reefers permission to serve its proceedings out of the jurisdiction on JFC in Russia, on the basis that the guarantees were governed by English law, that England was the natural forum, and that JFC's action in Russia was vexatious and oppressive. He said:

> "I also take the view on the material before me that the application to the Russian courts is vexatious and oppressive and an attempt to prevent the claimants from successfully proceeding in England. The Russian proceedings were commenced after the arbitration had been initiated; there was no letter before action; there was no warning that the point that there was no guarantee was to be taken; there was no notice of the proceedings when they had begun; and the issue as to whether or not there was an effective guarantee had never been raised before.
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> The argument that there is no effective guarantee seems to me very unconvincing, whether the relevant law be English or Russian law, and the proposed proceedings in Russia are necessarily likely to take a considerable time to resolve and will only deal with one portion of the potential dispute namely whether the guarantee is effective."

15. On 8 November 2010 Star Reefers' English action came before Teare J, this time *inter partes*. Teare J upheld the injunction. It is from his judgment that this appeal proceeds, with the permission of Lord Justice Tomlinson.

16. In the meantime Star Reefers had issued an application on 1 November 2010 in Russia to dismiss JFC's action on the ground that the Russian court lacked jurisdiction. Teare J criticised Star Reefers for not mentioning that application to him at the *inter partes* hearing.

17. On that occasion it appears that JFC's challenge to the English court's jurisdiction under CPR Part 11.1 was not yet before the court. Teare J nevertheless proceeded on the basis that the guarantees were governed by English law, by reason of an

implied choice of English law pursuant to article 3 of the Rome Convention, and that England was the natural forum for the resolution of the parties' disputes. These aspects of the debate are no longer in issue, although they were before the judge. Of course, Teare J could not have proceeded to uphold the grant of an anti-suit injunction unless he had considered England to be the natural forum: *SNIA v. Lee Kui Jak* [1987] 1 AC 871.

18. As it was, JFC's challenge to English jurisdiction did not formally come before the commercial court until 11 February 2011, when Andrew Smith J dismissed it: [2011] EWHC 339 (Comm), [2011] 2 Lloyd's Rep 215. Andrew Smith J proceeded on the basis that the issues were not foreclosed by Teare J's judgment and he considered the matter de novo. There has been no appeal from that judgment on jurisdiction.

19. The critical issue that remains in dispute therefore is as to Teare J's finding that JFC's conduct with respect to its proceedings in Russia was vexatious. He reasoned as follows. First, that the "Russian proceedings were commenced with a view to frustrating the determination of the dispute in England" (at para 19). In this connection he referred to Star Reefers' expressed wish to arbitrate its guarantee claim in London, although he accepted that that attempt was invalid. Secondly, the "apparent weakness of the point sought to be taken in Russia suggests that the proceedings are vexatious and oppressive, notwithstanding that the point is supported by evidence from a Russian lawyer" (at para 20). The judge said that he "cannot resolve" the dispute between the parties on the basis of the conflicting evidence of Russian law; and he accepted that, in Russia, the Russian court would apply its own law (*ibid*). Nevertheless he said that he found the evidence of JFC's expert, Professor Zenin, a professor of civil law at Moscow State University, "surprising" and that it was "very difficult to accept" that there had not been at least agreement by means of an exchange of documents between the parties, even if there was no one document signed by the parties (at paras 20/24). He therefore concluded:

> "25. Thus the circumstances in which the Russian proceedings were commenced coupled with the apparent weakness of the point sought to be argued in those proceedings strongly indicate that the proceedings are vexatious and oppressive.
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> 26. It therefore appears to me that the anti-suit injunction was properly granted and should be continued."

20. At that stage of his judgment, the judge had not yet considered the arguments raised by Mr Stephen Gee QC on behalf of JFC, although he turned to them at this point, but rejected them (at paras 27/30), concluding that "For the reasons which I have endeavoured to describe I consider that the Russian proceedings are

vexatious and oppressive" (at para 30). The judge nowhere considered the concept of comity.

21. On 1 April 2011 Michael Burton J considered Star Reefers' unopposed application for summary judgment, which he granted, [2011] EWHC 1166 (QB). The assessment of damages, also unopposed, was dealt with by HHJ Chambers QC on 20 May and 25 August 2011, whose full and careful judgment concluded with an award to Star Reefers in the sum of US$16,009,438.71 plus interest.

The expert evidence

22. JFC relies on the expert report of Professor Ivan Alexandrovich Zenin, Star Reefers relies on the expert report of its Russian legal advisor, Mr Victor Kozlov. I agree both with the judge's comments about this evidence, namely that it is not possible to resolve the dispute about Russian law at this stage, and that the conclusions of Professor Zenin nevertheless appear surprising, that is to an English lawyer. Nevertheless, it is clear on the material addressed by Professor Zenin that a Russian court, applying Russian principles of private international law, rather than the Rome Convention, would be bound to apply Russian law. It is also clear from Professor Zenin's detailed report that he would consider the letters relied on by Star Reefers as only constituting an *oferta* offering to enter into a contract of guarantee, and therefore as unable to bind JFC without an *aktsept* or acceptance on the part of Star Reefers. On that basis the exchange of prior drafts would be nothing to the point. Professor Zenin is a distinguished, independent, Russian lawyer. I remind myself that there are peculiarities in our own law of guarantees, for instance arising out of the Statute of Frauds; and that several apparently unmeritorious cases about guarantees, and possibly truly unmeritorious cases, have ultimately had to be determined in the House of Lords.

Submissions

23. On behalf of JFC, Mr Gee makes the following points. First, that in finding that the Russian proceedings were vexatious, the judge was wrong to consider that their purpose was to frustrate the determination of the dispute in England, and wrong to regard any apparent weakness in the argument from Russian law as evidence of vexatious intent. Secondly, the judge had ignored the legitimate juridical advantage which JFC could only obtain in Russia, by reference to an argument derived from Russian law. Thirdly, the judge had seriously undervalued the facts that JFC was first to commence court proceedings, and had done so in its own courts, and by reference to a legitimate argument, at any rate in those courts, as to the applicability of Russian law. Fourthly, the judge had similarly

undervalued the fact that JFC had not submitted to the English proceedings and was making it clear that it would not do so. Fifthly, the judge had made remarks about the need for an injunction to prevent "any risk of issues in the English proceedings being resolved by an issue of estoppel arising out of the Russian proceedings" which were difficult to understand. Sixthly, the judge had omitted any consideration of comity. Finally, there was a more technical argument to the effect that the judge had been wrong to say that there was any power to serve the injunction order out of the jurisdiction under CPR 6.37(5)(b)(ii) (as "any other document in the proceedings") or 6.38(1) (as ancillary relief).

24. On behalf of Star Reefers, on the other hand, Mr Charles Kimmins QC submits that the judge was right for the reasons he gave; but he also elaborated the matter further. Thus he said that not only the purpose of the Russian proceedings, to frustrate resolution of the dispute in England, but also the conduct of JFC in the Russian proceedings, in commencing them without warning, without previously disputing the guarantees, and without service of notice of the Russian claim form or orders of the Russian court until made to do so by that court, was clear evidence of vexatious conduct; and the weakness of JFC's Russian law case underlined that evidence. Secondly, that same weakness showed that there was no legitimate juridical advantage in Russia. Thirdly, it was wrong to suggest that the first litigant in the field could not be vexatious. Fourthly, submission to the English court was not a condition precedent to the jurisdiction to grant an anti-suit injunction. Fifthly, the question of issue estoppel had not entered into the judge's reasons for finding vexation or granting the injunction, but, if it had, the judge was entitled to take it into account: the risk of it reflected the dilemma faced by a defendant sued in an inappropriate forum. Sixthly, there was nothing inconsistent with the dictates of comity in the judge's injunction. And finally, the power to serve the injunction documents out of the jurisdiction was necessarily ancillary to the court's jurisdiction over the proceedings as a whole.

Jurisprudence

25. There was no dispute about the basic principles applicable to the power to grant an anti-suit injunction. What was needed was *either* an agreement for exclusive English jurisdiction or, its equivalent, an agreement for arbitration in England, in which case the court would ordinarily enforce the parties agreement by granting an anti-suit injunction in the absence of strong reason not to do so; *or* else two other conditions had to be satisfied, namely England had to be the natural forum for the resolution of the dispute and the conduct of the party to be injuncted had to be unconscionable: see *South Carolina Co v. Maatshappij 'De Zeven Provincien' NV* [1987] AC 24, *SNIA v. Lee Kui Jak* [1987] AC 871, *Airbus Industrie GIE v. Patel* [1999] 1 AC 119, *Donohue v. Armco Inc* [2002] CLC 440 and *Turner v. Grovit* [2002] 1 WLR 107. In the present case, there was no agreement for English jurisdiction or arbitration in the guarantees, and therefore it was the second of the alternatives which was in issue.

26. I ventured to summarise the relevant authorities in *Glencore International AG v. Exter Shipping Ltd* [2002] 2 All ER (Comm) 1 at paras 42/43 as follows:

> "42…However, jurisprudence has limited the conditions under which such an injunction may be regarded as 'just and convenient'. The following conditions are necessary. First, the threatened conduct must be 'unconscionable'. It is only such conduct which founds the right, legal or equitable but here equitable, for the protection of which an injunction can be granted. What is unconscionable cannot be defined exhaustively, but it includes conduct which is 'oppressive or vexatious or which interferes with the due process of the court' (see the *South Carolina* case [1986] 3 All ER 487 at 496, [1987] AC 24 at 41 per Lord Brandon of Oakbrook). The underlying principle is one of justice in support of the 'ends of justice' (see the *SNI Aerospatiale* case [1987] 3 All ER 510 at 519, 520, [1987] AC 871 at 892, 893 per Lord Goff of Chieveley). It is analogous to 'abuse of process'; it is related to matters which should affect a person's conscience (see *Turner v. Grovit* [2002] 1 WLR 107 at [24] per Lord Hobhouse of Woodborough). Secondly, to reflect the interests of comity and in recognition of the possibility that an injunction, although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in English proceedings; he must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed, and so there must be a clear need to protect existing English proceedings ([2002] 1 WLR 107 at [27]-[28]); the *Airbus Industrie* case). It follows that the natural forum for the litigation must be in England, but this, while necessary, is not a sufficient condition.
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> 43. While these are the conditions (and in this sense may be said to go to jurisdiction) for the grant of an anti-suit injunction, at a secondary stage, that of the exercise of discretion, the court will always exercise caution before granting an injunction (but cf *Aggeliki Charis Cia Maritima v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 in cases dealing with contractual arbitration and jurisdiction clauses). Moreover, because the court is concerned with the ends of justice, the respondent will always be entitled to show why it would nevertheless be unjust for the injunction to be granted (see the *SNI Aerospatiale* case [1987] 3 All ER 510 at 522, [1987] AC 871 at 896; *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) para 12-064)."

See also *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647 at para 89.

27. To similar effect is this summary by Toulson LJ from *Deutsche Bank AG v. Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 at [50]:

> "(1) Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do. (2) It is too narrow to say that such an injunction may be granted only on the grounds of vexation or oppression, but, where a matter is justiciable in England and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive. (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there. (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity. (5) An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that, in deciding questions of weight to be attached to various factors, different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, without occasioning a breach of customary international law or manifest injustice, and that in such circumstances it is not for an English court to arrogate to itself the decision how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention. (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive."

28. Reference has been made by one or other of the parties to cases which illustrate certain strands of these principles. Thus, in relation to the legitimate interest in the protection of English litigation, and thus the questions of the relevance of who invokes litigation first, and of whether the respondent submits to the jurisdiction of the English court or stands aloof, Mr Kimmins referred us to the following dicta. In *E I Du Pont de Nemours & Co v. Endo Laboratories Inc* [1987] 2 Lloyd's Rep 585, Bingham LJ said at 593:

> "Second, I do not regard this as a case in which the dates of the beginning proceedings are significant. As it happens, the English proceedings began first and the Illinois action a month later. It might have been the other way round. I

do not think the outcome of these appeals should be affected by what is little more than an accident of timing."

29. In *Deutsche Bank* at para 118, Toulson LJ referred to that passage with approval, and said he would attach little significance to the fact that the Texas action was begun before the English action, in part because "the natural consequence of treating it as an important factor would be to encourage parties to rush to fire the first shot". All that no doubt makes good sense in the appropriate case; but I would observe that what was in issue in *Du Pont* was an application, which failed, to stay and/or injunct the English proceedings. It was not a case concerned with unconscionability or abuse of process, but with whether the English claimants had shown a good argument for invoking the jurisdiction of the English court against foreign defendants. Moreover, in *Deutsche Bank,* the anti-suit injunction was sought on the basis of an English jurisdiction clause. I do not think that Mr Kimmins was able to show us a case in which a respondent, first in the field in a foreign jurisdiction (and here in its own domicile), was injuncted for his unconscionable conduct in the absence of his agreement to litigate or arbitrate in England. I do not say that it may not happen or have happened, only that it may be a strong thing to do and that an example of it happening has not come readily to hand.

30. As for the relevance of the respondent's lack of submission to the English court, Mr Kimmins disputed that this was a condition precedent, which I would accept. However, where a foreign defendant, impleaded in England, does not submit to the jurisdiction, and has not agreed to litigate or arbitrate in England, it is not obviously easy to visualise how his foreign proceedings will impede the English proceedings or why an anti-suit injunction will be necessary to protect the English claimant's legitimate interest in his English action. Ex hypothesi the English action will not be opposed. (I put on one side the so-called "single forum" cases, which are exceptional in nature, see Lord Goff in *Airbus Industrie* at 139G.) Thus, it has been recognised that the unconscionability of the foreign claimant is often to be found, mainly or substantially, in the very reason that he has first submitted to English jurisdiction as the forum where the parties' dispute will be resolved and then sought vexatiously to extricate himself from the consequences of that submission, or oppressively to prolong or multiply the litigation by commencing further proceedings abroad. Examples of that recognition can be founded in cases such as *Glencore v. Exter Shipping* itself (at [67]), *CAN Insurance Co v. OD Inc* [2005] EWHC 456 (Comm) at [27] (cited in *Dicey, Morris and Collins on The Conflict of Laws*, 14th ed, 2006, at para 12-078, footnote 48), *Tonicstar Ltd v. American Home Assurance Co* [2005] 1 Ll Rep I R 32 at [13] (where Morison J spoke of the attempt "to hijack the decision which is presently before this court"), and *Trafigura Beheer BV v. Kookmin Bank Co* [2007] 1 Lloyd's Rep 669 at [48]-[51] (Field J).

31. We were also shown a number of authorities where the weakness of the case sought to be pursued in the foreign court has been the subject of comment. In *Midland Bank v. Laker Airways* at 700 Lawton LJ said that "the weakness of the evidence is a factor which can be taken into account, together with more weighty factors, in deciding whether conduct is unconscionable", but that to treat such weakness "as a separate and distinct ground" of unconscionability was problematic. English judges could not set themselves up as examining magistrates to decide whether a foreign court had a case fit for trial. It was only in a case where it was "plain" that a case was "bound to fail" that the making of it was vexatious (see *British Airways Board v. Laker Airways Ltd* [1985] AC 58 at 86); but such cases were "likely to be rare". Such a rare (and clearly extreme) case (where the foreign claim was said to be "utterly absurd") was found to exist in *Shell International Petroleum Co v. Coral Oil Co Ltd* [1999] 2 Lloyd's Rep 606 at 609 (Thomas J); see also *Trafigura v. Kookmin* at [51] where an issue of the meaning of English words in a contract which had already been decided by the English court was said to be "hopeless". In *Elektrim SA v. Vivendi Holdings* [2009] 1 Lloyd's Rep 59 (CA) at [121] the foreign claim was described as "hopeless" and "bogus". In *The Eras EIL Actions* [1995] 1 Lloyd's Rep 64, on the other hand, Potter J was not prepared to regard the foreign pleas as "either made in bad faith or doomed to failure" and therefore looked for evidence of unconscionability elsewhere (at 84 lhc). It would seem to follow that in the present case, where Teare J stated that he was unable to resolve the issue of Russian law, while he was entitled to take his view of the apparent weakness of JFC's claim in Russia into account, he was hardly entitled to found himself on it as one of his two principal reasons for finding JFC's conduct to be vexatious.

Unconscionability

32. In my judgment, looking at these materials, I am unable, with respect, to agree with the judge's finding that JFC's conduct was vexatious. His first reason was that the Russian proceedings were commenced with a view to frustrating the determination of the dispute in England. However, this conclusion is unjustified. There was nothing which JFC could do in commencing proceedings in Russia to frustrate any proceedings in England. At the time of JFC's issue of its claim in Russia, no valid proceedings had been commenced in England, only Star Reefers' invalid claim to commence an arbitration against JFC. Even if that claim was to be viewed as a harbinger of future English court proceedings, the consequences of that would lie in the future. If JFC refused to submit to such proceedings, which is what in the event it has shown it would do, those English proceedings would take their own course, unaffected by the Russian proceedings. It is possible that an earlier judgment in Russia would interfere with Star Reefers' attempt ultimately to enforce an English judgment against JFC in Russia: but, if JFC refused to submit to the English jurisdiction, Star Reefers would always find it difficult to enforce its English judgment in Russia without litigating anew in Russia. Moreover, in Russia, an English judgment in which JFC had not participated would presumably not constitute any res judicata or estoppel. In effect, JFC's Russian proceedings

anticipate such possible, but problematic, enforcement proceedings. However, there is nothing unconscionable about that. JFC has not promised to litigate or arbitrate in England, and thus to accept the decision of the English courts or of an English arbitration award. It is entitled, so far as international understandings about such matters go, to stand aloof from English litigation. That may present difficulties for it in international commerce, but there is nothing unusual about such tactics. The enforcement of an English judgment is ultimately a matter for Russia and its courts, subject to any relevant treaty, about which we have been told nothing.

33. In this connection, the judge mentioned matters such as that the Russian proceedings were commenced without any warning, and without any express prior rejection of liability under the guarantees. This may not be good business or litigating practice, but it is hardly the stuff of unconscionable or vexatious conduct. It is, unfortunately, all too common. Meanwhile, it must have been quite plain to Star Reefers that it was running into trouble. Its letters had gone unanswered. It was forced to commence arbitration. The response from JFC was not promising: it rejected the suggestion that it was a party to the charterparties or their arbitration agreements (and was right to do so). Star Reefers' meeting with JFC in St Petersburg had reached no solution. Where did Star Reefers think that matters were headed but for dispute and litigation? It is unrealistic to suggest otherwise, however regrettable that may seem.

34. Mr Kimmins suggests in this context that it was a mere incident of timing that JFC's proceedings in Russia came first. I am unable to be confident about that on the evidence. Star Reefers wanted to involve both Kalistad and JFC in a London arbitration: such an arbitration, had JFC participated, would in due course have determined Kalistad's defence that it had been Star Reefers which had repudiated, and, on the assumption of the success that Star Reefers has obtained from the English court without opposition, would have resulted in awards against both Kalistad for unpaid hire and, more importantly, repudiation damages, as well as against JFC for damages under the guarantees. Armed with such awards, Star Reefers could have sought enforcement proceedings under the New York Convention. Perhaps that was Star Reefers' ambition. It would have been good tactics. If, however, JFC had participated in any arbitration only under reserve, disputing the jurisdiction of the arbitrators on the ground that it was a non-party to the arbitration agreements, then that question of jurisdiction might ultimately have ended up in the English court: which, as is now common ground, would have resolved the issue in JFC's favour. Alternatively, JFC might have stood aloof from the arbitration and taken the risk of resisting enforcement of any award in Russia, by raising the defence that there was no valid arbitration agreement. However, instead JFC went on the attack in Russia, as it seems to me it was entitled to do, relying on Russian principles of private international law for the application of Russian law as the putative proper law of the guarantees, and on substantive Russian law for its defence under the applicable principles of *oferta* and *aksept*. In these circumstances, it is not clear to me that Star Reefers would have abandoned

its tactics of proceeding by way of arbitration had not JFC gone to court in Russia. We have been shown no evidence from Star Reefers to determine this.

35. Mr Kimmins also relies on JFC's failure to serve notice of the Russian proceedings on Star Reefers until 7 September 2010. This is a matter of real concern, although not relied on by the judge. However, whatever be the reason for this failure, it went nowhere, for the Russian court was unwilling to proceed without proof of service.

36. The second principal matter relied on by the judge was the apparent weakness of JFC's case under Russian law. However, even on the judge's findings, this case does not fall into that special category where it can be said that the foreign proceedings are based on a hopeless claim, or one doomed to failure. On the contrary, the judge said that he was unable to resolve the issue which arose on the experts' reports under Russian substantive law. He was satisfied, moreover, that Russian proper law applied to the guarantees in the Russian court. He was entitled to have regard to his view that Professor Zenin's evidence was surprising, but he was unable to reject it. This is not a case where a foreign claimant comes to the English court armed with nothing but his pleaded assertions under foreign law. In the circumstances, the judge appears to have entirely overlooked the circumstance that JFC had a juridical advantage in the Russian court, unavailable to it, as it turned out, in England, namely the application of Russian rather than English law to the substance of the parties' dispute. Unless that juridical advantage can be said to be hopelessly and cynically invoked, it is a legitimate advantage. It is hard to see that a party can be said to be acting unconscionably when it seeks a legitimate juridical advantage in a foreign court, especially where that is the court of its domicile, the place where any obligation falls to be performed, and the place where, if there was a contract of guarantee created by the posting of the guarantee letters to Star Reefers from Russia, those contracts were made.

37. It seems to me that it is also relevant that JFC had not submitted to the English court, and had made it reasonably clear that it planned not to do so. This was therefore not the typical case of vexatious conduct created by the issue of foreign proceedings in the face of English proceedings in which the foreign defendant had participated and from the consequences of which he was now seeking to extricate himself by the multiplication of litigation abroad.

38. In sum, I do not know of any case which has gone as far as this in finding unconscionable conduct on the part of a foreign party who has not agreed to litigate or arbitrate in England; has been the first to issue court proceedings; has an arguable, if apparently, at any rate to English eyes, weak case under the admittedly applicable law of the foreign forum; therefore has a legitimate juridical advantage in seeking to litigate in Russia, which is the forum of its domicile and

its disputed obligation; and who has not submitted to or participated in the English proceedings.

39. In consequence, there is, as it seems to me, something of a touch of egoistic paternalism in an English court injuncting continuation of the foreign proceedings in such a case. In my judgment, Star Reefers' application for an anti-suit injunction should have failed at this point of the argument.

Comity

40. In any event, in such circumstances the considerations of comity become of especial importance. The judge however took no account of such considerations. That is an error in the exercise of his discretion, having found the conditions for the exercise of his power made good. In my judgment, in the light of the reasons which I have sought to set out above, the considerations of comity should have in any event caused the English court to pause long and hard before granting an injunction in such a case. It seems to me that an injunction was not necessary, and was not in the interests of justice. It is not always possible to ensure that parties' litigation is canalised into the channel of a single set of proceedings. This is not a case where a party has issued two sets of proceedings. Rather there is a typical battle of forums (or fora) between an English claimant who seeks to invoke English principles of private international law and thus English substantive law, and a foreign claimant who seeks to invoke the principles of private international law and thus the substantive law of another country. On the evidence before the judge, the English proceedings were very likely to have been completed before the Russian proceedings in any event. It was not necessary to protect the English proceedings that an anti-suit injunction be given against the foreign proceedings. What the effect will be in Russia of a move for enforcement of an English judgment in the circumstances has not been the subject of evidence or submission.

41. While the finding of vexatious conduct may well carry a court nearly all the way to the conclusion that it would be right in the interests of justice, and despite considerations of comity, to grant an anti-suit injunction, in the present case, the weakness of the case concerning vexatious conduct combines with the caution prompted by considerations of comity to the result that an anti-suit injunction ought not to have been granted. As things stand, Star Reefers has its judgment.

Service out of the injunction documentation

42. In the circumstances this point does not matter. However, I agree with the judge that the application for the injunction and the order granting it could be served on JFC in Russia, as being either a "document in the proceedings" and/or "in protection of the [court's] jurisdiction and its processes, including the integrity of its judgments" (to refer to the judgment of Lawrence Collins LJ in *Masri v. Consolidated Contractors International* [2009] QB 503 at [26]). The latter is exactly what the purpose of an anti-suit injunction is, quite irrespective of the matter of issue estoppel which the judge also relied on.

43. Mr Gee described this point as going to jurisdiction. In my judgment it does not. Jurisdiction over JFC with respect to Star Reefers' claims under the guarantees has already been achieved, and there has been no appeal from those aspects of the judgments of Teare J and Andrew Smith J. In the circumstances, although JFC has (albeit unsuccessfully) challenged the jurisdiction of the English court over it, and has not entered an appearance since losing its challenge on jurisdiction, I raise the question whether its appeal on the question of the anti-suit injunction against it, or the pursuit of its appeal to a hearing, is consistent with its case that it has not submitted to the jurisdiction. However, that has not been the subject of any argument before us.

Conclusion

44. In sum, I would allow the appeal and set aside the anti-suit injunction.

Lord Justice Sullivan :

45. I agree.

Lord Justice Lewison :

46. I also agree.