Neutral Citation Number: [2012] EWCA Civ 644

Case No: A3/2011/3246 + 3247 & A3/2012/0918

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE BLAIR
[2011] EWHC 308 (Comm) and [2011] EWHC 3252 (Comm)
MR JUSTICE TEARE
[2012] EWHC 1023 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2012

Before :

LORD JUSTICE LLOYD
LORD JUSTICE STANLEY BURNTON
and
SIR MARK POTTER

- -

Between :

JOINT STOCK ASSET MANAGEMENT COMPANY INGOSSTRAKH-INVESTMENTS	**Appellant**
- and -	
BNP PARIBAS SA	**Respondent**

- -
- -

Vasanti Selvaratnam QC & Henry Ellis (instructed by **Messrs. Bryan Cave**) for the **Appellant**
Graham Dunning QC & Stephen Houseman (instructed by **Messrs. Clifford Chance LLP**) for the **Respondents**

Hearing dates: 24th & 25th April, 2012

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Approved Judgment

LORD JUSTICE STANLEY BURNTON :

Introduction

1. This is another case in which the grant of an anti-suit injunction against a foreign company restraining it from continuing to prosecute proceedings in its own jurisdiction falls to be considered.

The orders under appeal

2. We have before us the following appeals by Joint Stock Asset Management Company Ingosstrakh-Investments, a Russian company:

   (1) Its appeal against the order made by Blair J dated 24 November 2011 dismissing its challenge to the jurisdiction. I shall refer to his judgment leading to that order, [2011] EWHC 308 (Comm), as his or the judgment.

   (2) Its appeal against the Interim Order made by Blair J of the same date in which an anti-suit injunction was granted restraining it until further order from taking any further part in proceedings which it had commenced in Russia ("the Russian Proceedings") on the ground that those proceedings involved vexatious, oppressive and unconscionable conduct on its part. I shall refer to his judgment leading to that order, [2011] EWHC 3252 (Comm), as his second judgment.

   (3) Its appeal against the order dated 20 April 2012 made by Teare J pursuant to CPR 6.15(2) declaring the claim form to have been validly served on it by reason of its having been provided to Bryan Cave, solicitors in London, on 20 June 2011.

The facts

3. I can take the facts from Blair J's full and careful judgment.

(a) The Guarantee

4. The Respondent, BNP Paribas S.A. ("the Bank") is a French bank. The First Defendant in these proceedings, Open Joint Stock Company Russian Machines (to which I shall refer as "D1"), like the Appellant a Russian company, entered into a Guarantee dated 1 October 2008 in favour of the Bank ("the Guarantee") by which it guaranteed certain liabilities of one of its subsidiaries, Veleron Holding BV. The guaranteed liabilities arose under a collateralised margin loan made by the Bank to the subsidiary. According to the Appellant's Statement of Claim in the Russian Proceedings, the credit amount under the Credit Agreement with Veleron to which the Guarantee related was up to US$1,229,000,000. The Guarantee is governed by English law, and provides for disputes to be referred to arbitration under the LCIA rules, with the Bank having the option to bring proceedings in the Courts of England instead. Recital (2) to the Guarantee is as follows:

> "(2) The Board of Directors of the Guarantor is satisfied that entering into this Guarantee is for the purposes and to the benefit of the Guarantor and its business."

5. The relevant substantive provisions, in which the Bank is referred to as "the Beneficiary" are as follows:

> "16. ARBITRATION
>
> 16.1 Subject to Clause 16.4, any dispute (a "Dispute") arising out of or in connection with this Guarantee (including any question regarding the existence, validity or termination of this Guarantee or the consequences of its nullity) shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration.
>
> 16.2 Procedure for arbitration
>
> 16.2.1 The arbitral tribunal shall consist of one arbitrator who shall be a Queen's Counsel of at least five years' standing
>
> 16.2.2 The seat of arbitration shall be London, England and the language of the arbitration shall be English.
>
> 16.3 Save as provided in Clause 16.4, the parties to this Guarantee exclude the jurisdiction of the courts under Sections 45 and 69 of the Arbitration Act 1996
>
> 16.4 Before an arbitrator has been appointed to determine a Dispute, the Beneficiary may by notice in writing to the Guarantor require that all Disputes or a specific Dispute be heard by a court of law. If the Beneficiary gives such notice, the Dispute to which that notice refers shall be determined in accordance with Clause 17.1
>
> 17. ENFORCEMENT
>
> 17.1 In the event the Beneficiary issues a notice pursuant to Clause 16.4, the following provisions shall apply:
>
> 17.1.1 Subject to Clause 16.1 the courts of England have exclusive jurisdiction to settle any Dispute
>
> 17.1.2 The Beneficiary and the Guarantor agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly neither the Guarantor nor the Beneficiary will argue to the contrary
>
> 17.1.3 This Clause is for the benefit of the Beneficiary only. As a result, the Beneficiary shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Beneficiary may take concurrent proceedings in any number of jurisdictions

> 17.2 Without prejudice to any other mode of service allowed under any relevant law, the Guarantor:
>
> 17.2.1 irrevocably appoints Bryan Cave of 88 Wood Street, London EC2V 7AJ England (or, if different, its registered office) as its agent for service of process in relation to any proceedings before the English Courts in connection with this Guarantee; and
>
> 17.2.2 agrees that failure by a process agent to notify the Guarantor of the process will not invalidate the proceedings concerned."

(b) The proceedings

6. A dispute arose under the loan agreement, and the Bank sought to enforce the Guarantee. On 6 August 2010, it commenced arbitral proceedings against D1 claiming about US$ 80 million. D1 is represented by Steptoe & Johnson. On 6 September 2010, it served its Response. It alleged that the Guarantee was invalid for want of consideration. D1 also alleged that, contrary to Recital (2), it did not receive the approval of the Board.

7. On 16 November 2010, the Bank and D1 entered into an agreement to vary the arbitration agreement before substituting for arbitration by a Queen's Counsel arbitration before Professor Albert van den Berg or, in the event of his inability to act, a Queen's Counsel. The amendment agreement provides as follows:

> "1. AGREEMENT TO ARBITRATE THE DISPUTES BEFORE PROFESSOR VAN DEN BERG
>
> 1.1 In consideration of the mutual promises as set forth below, the Parties agree that any disputes arising out of or in connection with the Guarantee (including any question regarding the existence, validity, enforceability or termination of the Guarantee or the consequences of its nullity) shall be referred to and finally resolved by arbitration under the Arbitration Rules of the LCIA in LCIA Arbitration No. 101665.
>
> 1.2 The arbitral tribunal shall consist of one arbitrator who shall be Professor van den Berg. If, for any reason, Professor van den Berg cannot act as arbitrator in LCIA Arbitration No. 101665, the arbitrator shall be a Queens Counsel of at least five years standing.
>
> 1.3 The seat of the arbitration shall be London, England and the language of the arbitration shall be English.
>
> …
>
> 1.5 Clause 16 of the Guarantee shall be amended accordingly.
>
> 1.6 Clauses 17.1 and 17.2 of the Guarantee are repealed.
>
> 2 GOVERNING LAW

> 2.1 This Agreement shall be governed by and construed in accordance with English Law."

8. In addition to the appointment of Professor van den Berg, the Bank and D1 "repealed" the provision in the arbitration agreement as contained in the Guarantee by which the London office of Bryan Cave LLP was appointed by the D1 as agent for service of process in relation to any proceedings before the English Courts in connection with the Guarantee, on the basis, it seems, that since the dispute was to be determined by arbitration it was no longer required.

9. Professor van den Berg ("the Arbitrator") accepted his appointment and on 1 December 2010 the LCIA Court confirmed his appointment as sole arbitrator, and the arbitration got under way.

10. At the date of both orders of Blair J under appeal, the Appellant was the trust manager of a very small holding of shares in the D1 (about 0.14 per cent) that belongs to the Socium Non-Governmental Pension Fund. It no longer holds those shares; that may be relevant to the continuation of the injunction if its appeals fail, but it is common ground that it is otherwise irrelevant to the issues before this Court. In any event, Non-Governmental Pension Fund "Socium" ("D5"), to which the Appellant's shares have been transferred, and other companies holding shares in D1 have joined in the Russian Proceedings, and the Bank has obtained similar injunctions against them. The decisions of this Court on this appeal are likely to be of significance to the continuation of those injunctions.

11. On 27 December 2010, the Appellant commenced proceedings before the Moscow Arbitrazh Court seeking invalidation of the Guarantee on the basis that it was an "interested party transaction", and a "major transaction" under the Russian Joint Stock Company Law, which should have been, but had not been, approved by the Board of D1 and at a general meeting of the shareholders. Both the Bank and D1 are defendants to those proceedings. The proceedings were served on the Bank on 13 January 2011, and this was when it became aware of them.

12. Various procedural hearings took place in the arbitration and in the Moscow Arbitrazh Court in February. On 4 February 2011, D1 served its Statement of Defence in the Russian Proceedings, in which it alleged, among other things, that the Guarantee was invalid because, as a matter of Russian law and its corporate by-laws, and as the Bank had known, it had been subject to the approval of D1's Board of Directors which had never been given. It appears to be D1's case that what appeared to be signed Board minutes of D1 were merely drafts.

13. The Bank's evidence is that it took some time to investigate the ownership structure of the Defendants. On 8 April 2011, the Bank issued a motion in the Arbitrazh Court to dismiss the Russian proceedings on the basis of lack of jurisdiction by reference to the arbitration.

14. On 11 April 2011, the Bank requested the arbitrator's permission for the purposes of s. 44(4) Arbitration Act 1996 to commence an anti-suit action against both Defendants. The matter was disputed by D1 and the Appellant in correspondence, but by Order No.3 in the arbitration dated 4 May 2011, the Bank's request was granted.

15. On 27 May 2011, the Bank applied to the Commercial Court for permission to serve an anti-suit action on the Appellant out of the jurisdiction. The application was made in respect of the Appellant only on the basis that the Bank could serve D1 within the jurisdiction pursuant to the original service clause in the Guarantee. Unfortunately, the Bank's solicitors had overlooked the fact that the clause in question had been "repealed" by the agreement appointing Professor van den Berg. It is not disputed that this was an innocent oversight.

16. It was appreciated that the application raised a "number of complex issues" and it was accompanied by a skeleton argument settled by leading counsel (not counsel who appeared on behalf of the Bank before Blair J or this Court). It was submitted that the claim in the Russian Proceedings was properly to be treated as subject to the arbitration agreement, alternatively that its pursuit was vexatious and oppressive. The heads of jurisdiction relied upon were (1) that there was a real issue between the Bank and D1 to which the Appellant was a necessary or proper party, (2) that the contract in respect of which the claim is made (the Guarantee) was made in England and governed by English law, and (3) under CPR 62.5(1)(b) so far as the claim was for an order under s.44 Arbitration Act 1996, and under CPR 62.5(1)(c) so far as the Bank was seeking a remedy affecting an arbitration.

17. In the usual way, the matter was considered on the papers, and on 8 June 2011 Hamblen J made the order sought. He gave permission to serve the claim out of the jurisdiction on the Appellant (a) pursuant to the Hague Convention at their address in Moscow (b) by leaving a copy with the Appellant's lawyers in Moscow, and (c) by delivering a copy by registered mail to the Appellant and to its lawyers in Moscow.

18. On 20 June 2011, the proceedings were served on Bryan Cave LLP at its London office (pursuant to the repealed provision in the Guarantee), and on the Appellant by delivery by hand to its lawyers in Moscow and by registered post in Moscow.

19. On 21 June 2011, the first hearing took place in the Moscow Arbitrazh Court in the Russian Proceedings. The Bank participated (and has continued to participate) in those proceedings under reserve as to the jurisdiction. The Bank's motion to dismiss based on the arbitration was rejected.

20. On 27 June 2011, both D1 and the Appellant acknowledged service of the Claim Form, and indicated their intention to dispute jurisdiction and the use of the Part 8 procedure. There ensued correspondence between the three parties, and applications, relating to the making and hearing of their applications challenging jurisdiction and service.

21. On 14/15 July 2011, the claim (and associated documents) were filed by the Bank's solicitors with the Foreign Process Section at the Royal Courts of Justice for service on the Appellant under the Hague Convention. Both Defendants' applications challenging jurisdiction and service (and in the case of the Appellant seeking to set aside the 8 June 2011 order) were issued on 25 July 2011.

22. During August 2011, there were two hearings in the Moscow Arbitrazh Court, resulting in the dismissal of the Appellant's claim in the Russian proceedings, on the basis that the claim had been brought outside the one year limitation period applicable to such a claim under Russian law.

23. On 22 August 2011, in the English proceedings, the Bank issued its cross application in response to those of the Defendants.

24. On 14 September 2011, the Appellant filed an appeal in the Russian Proceedings, which was served on the Bank's Moscow lawyers on 20 September 2011.

25. The arbitrator heard the first phase of the issues in the arbitration at a hearing in London between 26 and 30 September 2011.

26. During September 2011, the Bank was trying to agree a date with the Defendants for the hearing of their applications in the English anti-suit proceedings.

27. On 6 October 2011, the Bank asked the Commercial Court for an expedited hearing of the Defendants' applications. After representations by the parties, on 20 October 2011 Gloster J ordered that the hearings be listed for 7 - 8 November 2011.

28. On 28 October 2011, the Bank issued its application for an interim injunction. It effectively sought to restrain D1 from assisting in the Russian appeal, and D2 from pursuing the appeal. The defendants objected to this being heard along with their jurisdiction challenge. Gloster J directed that it should be for the judge hearing the application to decide that matter, taking into account whether there was time to do so.

29. Meanwhile, on about 17 October 2011 the date of the hearing of the Appellant's appeal in the Russian Proceedings to the appellate division of the Arbitrazh Court appeared on the court website listed for 15 November 2011. There was a dispute as to what would happen on that date. The Bank said that the court might well dispose of the appeal. The Defendants said that it was more likely to go off for a further hearing. In evidence filed on 11 November 2011, the Appellant stated that there was no sensible prospect of the appeal in Russia going ahead in the light of the Bank's recent motion to dismiss the claim.

30. The hearing on 7 - 8 November 2011 before Blair J took a full two days. There was no time to deal with the Bank's application for an interim anti-suit injunction pursuant to its application of 28 October 2011. Blair J reserved judgment at the end of the hearing on 8 November 2011.

31. On 10 November 2011, the Bank gave notice that it intended to apply for an interim injunction, which it did before Blair J the following day. After hearing argument from all parties, he ruled that the balance of convenience favoured the Bank, because if the appeal in Russia were to go ahead on 15 November 2011 there was a risk that the Guarantee might be invalidated, thereby rendering the decision in the English proceedings otiose. The Defendants were not prepared to agree to a consensual adjournment of the appeal in the Russian proceedings due to be heard on 15 November 2011. On 11 November 2011, Blair J granted limited injunctive relief, requiring the Defendants to make postponement requests in the Russian Proceedings, intended to preserve the status quo until his decision on jurisdiction could be handed down.

32. The Defendants duly filed their postponement requests. However, on 15 November 2011, the Appellate Court in Russia dismissed the postponement requests. The decision of August 2011 dismissing the Defendants' claim (as to which see paragraph

22 above) was annulled on technical grounds. A Final Appeal Hearing was scheduled for 30 November 2011, to be conducted as a *de novo* re-hearing of the claim at first instance.

33. On 24 November 2011 Blair J handed down his judgment on the jurisdictional and service issues and granted an interim anti-suit injunction against D1 and the Appellant.

34. On 28 November 2011, D1 filed a further acknowledgment of service, submitting to the jurisdiction of the English courts. It has not appealed against the orders made by Blair J on 24 November.

35. On 30 November 2011, the Final Appeal Hearing in the Russian Proceedings took place before the Appellate Court in Moscow. Consultrend Enterprises Ltd ("D3"), the holder of 99 per cent of the shares in D1, supported the Appellant's appeal (the Appellant having in the meantime been injuncted by Blair J's order of 24 November). The Appellate Court dismissed the Appellant's claim.

36. At some stage other shareholders of D1, namely Alta-Britt Interholding Limited ("D4"), which holds 0.86 per cent of the shares in D1, D5 and Veleron Holding B.V. ("D6"), which had been named as third parties in the Russian Proceedings, supported the claims of D1 and the Appellant as to the invalidity of the Guarantee. D5 claimed to be substituted for the Appellant, following the transfer of the shares in the name of the Appellant to D5.

37. On 13 December 2011, Blair J made *ex parte* orders joining D3 and D4 as defendants in the Bank's claim and for their service, and granted interim *ex parte* anti-suit injunctive relief against them.

38. On 23 December 2011, the Arbitrator issued a Partial Award for Phase 1 of the Arbitration. D1's challenge to the validity of the Guarantee under Russian law was dismissed on the merits. The Arbitrator found that the Guarantee is valid and binding and enforceable as a matter of English law and Russian law. There has been no challenge to the Award, which is now final and binding as between the Bank and D1.

39. On 1 March 2012, Burton J made orders for the joinder and service of D5 and D6, and granted *ex parte* anti-suit injunctions against them.

40. On 12 April 2012, the Cassation Appeal Court in Moscow dismissed D5's cassation appeal against the dismissal of the Appellant's claim for the invalidation of the Guarantee.

41. On 18 April 2012 Teare J heard the Bank's application for an order declaring that these proceedings had been validly served on the Appellant by service on Bryan Cave. On 20 April Teare J handed down judgment on that application and made the order sought by the Bank. That order is one of the subjects of these appeals.

42. None of D3, D4, D5 or D6 was represented in or a party to the present appeals. However, this Court's decision in these appeals will clearly be relevant to the proceedings against them.

The issues in these appeals

43. There are at the most general level three issues:

    (1) Was there jurisdiction to grant the injunction granted by Blair J?

    (2) If so, was the judge entitled to exercise his discretion by granting the injunction?

    (3) Were the procedural requirements for the grant or continuation of the injunction satisfied?

44. However, there are a relatively large number of subsidiary issues:

    (1) Did the Bank establish, to the requisite standard, the cause of action which, it alleged, entitles it to injunctive relief?

    (2) If so, was the Bank guilty of delay such as to disentitle it to injunctive relief?

    (3) Should considerations of comity exclude the grant of injunctive relief?

    (4) Could an order for service on the Appellant out of the jurisdiction be made under CPR 62.5(1)(b) (the claim is for an order under section 44 of the Arbitration Act 1996) or (c) (the Bank seeks some other remedy or requires a question to be decided by the court affecting an arbitration, an arbitration agreement or an arbitration award) or CPR 6.36 and PD6B Ground 3 (necessary or proper party).

    (5) Is England the *forum conveniens*?

45. Both the parties and the judge considered procedural questions, and in particular the applicability of the gateways prescribed by the CPR for service out of the jurisdiction, before addressing the question whether the Bank had established that there was a serious issue to be tried as to the cause of action relied upon by the Bank. I find it more logical to determine whether there is a serious issue to be tried before addressing the procedural issues.

The Bank's cause of action

46. The cause of action asserted by the Bank in these proceedings is the right to be protected from vexatious foreign proceedings by a party seeking to affect or to deprive the Bank of the benefit of a consensual arbitration agreement providing for the resolution of disputes by arbitration in this country. As against a party to an arbitration agreement, there is neither dispute nor doubt that there is such a cause of action and that anti-suit injunctions may be granted to protect the jurisdiction of the arbitrators under a binding arbitration agreement.

47. The subject matter of the Russian Proceedings is the validity of the Guarantee. That is an issue that was expressly made subject to the arbitration agreement in the Guarantee. It is now recognised under English law, and was widely recognised earlier under foreign laws, that an arbitration agreement is to be regarded as an agreement separate and distinct from the contract of which it forms part: see, e.g., *Harbour*

Assurance Co (UK) Ltd v Kansa General International Insurance [1993] QB 701 (in which a claim that the principal contract was unlawful and therefore invalid was subject to arbitration) and *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20 [2007] 2 Lloyd's Rep 267 (claim that contract induced by bribery subject to arbitration agreement). Section 7 of the Arbitration Act 1996 specifically provides:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

48. It is significant that neither in the Russian Proceedings nor in the arbitration nor in these proceedings has it been suggested by D1 or the Appellant that the arbitration agreement in the Guarantee is not valid and binding. It follows that any attempt by D1 to have any issue within the scope of the arbitration agreement determined otherwise than by arbitration is a breach of that agreement. The Court will readily restrain such a breach by the grant of an anti-suit injunction against the party in breach or threatening to breach its arbitration agreement.

49. What is unusual in this case is that an injunction has been granted not only against a party to the arbitration agreement, but also against a non-party. By definition, a non-party has not agreed to submit his claim to arbitration, and in the absence of a good collateral ground for restraint, an anti-suit injunction should not be granted against it solely on the basis that the issue in the proposed suit is already the subject of arbitration proceedings involving an associated company.

50. The ground alleged by the Bank as justifying the inclusion of the Appellant in the anti-suit injunction is its collusion with D1 in bringing and prosecuting the Russian Proceedings. In form, the Russian Proceedings were brought by a shareholder in D1 that is not a party to the arbitration agreement, and D1 is a defendant, rather than a claimant, in those proceedings. The Bank alleges that in fact the proceedings are collusive, having been brought by agreement between D1 and the Appellant for the purpose of defeating or impeding the Bank's right to pursue its remedy against D1 by means of the arbitration proceedings and the enforcement of any award it may obtain in the arbitration. In effect, the Russian Proceedings are a joint venture between the Appellant and D1.

51. The Bank accepts, as I understand it, that the Appellant is not the *alter ego* of D1. However, if the decisions made by D1 in the arbitration and in the Russian Proceedings, and by the Appellant in the Russian Proceedings, are in fact co-ordinated decisions made by the same person or persons, then it seems to me that the allegation of collusion would be made out, and it was unconscionable for the Appellant to bring and to pursue proceedings the object of which was to obtain a decision of the Russian Courts on the validity of the Guarantee more favourable in form or effect than in the arbitration to which D1 had agreed to submit the very same question. The ultimate object of D1 and the Appellant would be, of course, to preclude or render more difficult the enforcement of any arbitration award. Such proceedings are vexatious, in

that they require the Bank either to incur the costs and risks of litigation in Russia (including any appellate proceedings) in addition to the agreed arbitration, or, if the Bank were to ignore those proceedings, submit it to what may be an unacceptable risk that its Guarantee cannot be enforced.

52. I turn, therefore, to consider whether the evidence before Blair J justified his finding that the Bank's allegation of collusion raised a serious issue to be tried. The Bank relies on the matters set out in paragraphs 53 to 56 below.

53. Before Blair J, as before us, it was common ground that D1 and the Appellant are related companies, that Mr Oleg Deripaska is the ultimate owner of both companies, and that, as stated in his solicitor's witness statement, he "ultimately controls" both of them. The Appellant's solicitors in these proceedings are the solicitors who have acted for Mr Deripaska for over 10 years. If there is a trial of the Bank's present claim, it will be relevant to know whether he knew of or agreed to the execution of the Guarantee, which is a very substantial financial transaction affecting the group, whether he knew of the commencement of the arbitration and whether he was a party to the Appellant's decision to bring the Russian Proceedings, which similarly were of importance to the group. It seems to me that the Bank is entitled to ask the Court to infer, in the absence of good evidence to the contrary, that all these questions should be answered affirmatively. It is also curious that the original company complaining in the Russian proceedings that there was no approval of the Guarantee by the shareholders of D1 was the Appellant, a company the shareholding of which is so tiny that, viewed in isolation (as it asks us to do), it could not have had any effect on the decision of a general meeting, in circumstances in which, so far as I have seen, it did not (at least so far as the evidence goes) obtain the support of the other shareholders (all controlled by Mr Deripaska).

54. The Bank asserts that the timing of the Russian Proceedings, so long after the Guarantee was executed on 1 October 2008, but shortly after the Bank filed its Statement of Case in the arbitration, points to collusion.

55. The judge listed in paragraph 82 of his judgment 9 "overt acts" relied upon by the Bank as supporting its allegation of collusion:

    (1) The order of the Arbitrazh Court of 3 February 2011 records D1 "upholding" the position of D2.

    (2) The same decision shows the first defendant leaving the Bank's motion to adjourn "to the Court's discretion".

    (3) The defence filed in due course by the first defendant contains in translation, the following: "On the basis of the foregoing, Russian Machines OJSC believes that the demand advanced by the Claimant is well-founded and leaves the question of granting the claim to the discretion of the court." Particular reliance was placed on this by the Bank.

    (4) The above should be contrasted, the Bank submits, with what D1 should have done. It should have supported the Bank's application for a dismissal of the Russian Proceedings, so that the issue could be decided within the current London arbitration. Instead, it adopted an adverse position: reference is made

to the minutes of the Arbitrazh Court hearing on 21 June 2011 which records D1 objecting to the motion filed by the Bank, and explaining that D1 and the Appellant are not "affiliated entities".

(5) At the same hearing, D1 objected to the Bank's oral motion to adjourn the proceedings so it could examine documents which had been submitted as evidence.

(6) The Bank submits that the record shows D1 filing evidence in support of the Appellant's case.

(7) At the hearing on 4-8 August 2011 at the Arbitrazh Court, it is said that D1 continued to support the Appellant. Reference is made to the judgment, to the effect that D1 "holds that the [Appellant's] claims are well founded and asserts that the contested agreement was an interested party transaction…".

(8) At the same hearing, D1 filed more evidence in support of the Appellant's case.

(9) At the hearing in front of the Arbitrazh Court on 4 August 2011, D1 objected to the production of documents as had been requested by the Bank.

56. Before this Court, the Bank added the following:

(1) The Appellant could have joined in the arbitration, under the LCIA rule (rule 22.1(h)) permitting joinder with the agreement of one of the original contracting parties to the arbitration.

(2) The relief sought in the Russian Proceedings includes contractual relief against the Bank.

(3) At least one ground for invalidating the Guarantee asserted in the Russian Proceedings by the Appellant (the lack of Board approval) is the same as that asserted by D1 in the arbitration. However, the only ground relied upon by the Appellant that is referred to in the Arbitrazh Court decision of 31 December 2010 (permitting the claim to be commenced and served on the named defendants and third parties) is the lack of the approval of the shareholders of D1, a ground that was not taken in the arbitration.

(4) In the Russian Proceedings D1 made no reservation as to the jurisdiction of the Court to determine the validity of the Guarantee: it was bound to protest the jurisdiction because the arbitration agreement deprived the Russian Court of that jurisdiction, at least so far as D1 was concerned.

(5) Furthermore, in the Russian Proceedings D1 supported the case of the Appellant. Indeed, it was D1's Director of Legal Affairs who identified a formal defect in the Arbitrazh judgment of 15 August 2011, which had not been correctly signed by the relevant court secretaries, and fed the existence of the defect to the Appellant.

57. I am not impressed by the points I have summarised in the previous paragraph. It was in the financial interests of D1, at least so far as the Guarantee is concerned, to

support the case of the Appellant in the Russian Proceedings. Action taken by D1 in its own interests is not necessarily indicative of collusion by the Appellant. The same comment is applicable to some of the nine matters to which Blair J referred. However, the common control of D1 and the Appellant, the importance of the transactions, the arbitration and the Russian Proceedings, the timing of the Appellant's action in commencing those proceedings, and the improbability of the Appellant acting alone, are in my judgment sufficient to give rise to a serious issue to be tried as to whether or not the proceedings are collusive, so that in fact the Appellant is the stalking horse for D1.

58. The Appellant understandably placed great reliance on the judgments in this Court in *Star Reefers Pool Inc v JFC Group Ltd* [2012] EWCA Civ 14. However, that was a very different case to the present. Star Reefers was a ship owner. It entered into two charterparties with companies nominated by JFC. JFC executed guarantees of the liabilities of its nominee companies under the charterparties. The charterparties included London arbitration agreements. Significantly, the guarantees did not. JFC brought proceedings in Russia challenging not the validity of the charterparties, but the validity of the guarantees to which it was a party. It is not surprising that this Court rejected the contention that JFC had acted vexatiously or unconscionably in bringing those proceedings. It was not a party to any arbitration agreement, and it was not seeking the determination of any issue in the arbitrations between Star Reefers and the charterers. It was simply seeking the determination of the validity of a contract it had entered into. By contrast, in the present case in the Russian Proceedings the Appellant seeks the determination of an issue under a contract to which it is not a party that has been validly referred to arbitration; and it is alleged that it is doing so in concert with D1, and is a party to D1's breach of its binding arbitration agreement. The judgment of this Court in *Star Reefers Pool Inc v JFC Group Ltd* does not assist the Appellant.

59. I would therefore reject the contentions of the Appellant on this point.

Issue estoppel

60. The Appellant submits that it is not open to the Bank to contend that it, the Appellant, acted vexatiously or unconscionably by reason of the finding of the Arbitrazh Court in its judgment of 15 August 2011 in which it stated:

> "The Court rejects the arguments by BNP Paribas SA to the effect that the claimant (i.e., the Appellant) is abusing its rights …"

The Appellant submits that the judgment creates an issue estoppel binding on the Bank.

61. I would reject this contention. In the first place, I do not think that the issue whether the Appellant abused its rights as a shareholder under Russian law is the same as the question whether, if it is acting in concert with D1 in bringing the Russian Proceedings, its action is vexatious and unconscionable as a matter of English law, by reason of the arbitration agreement binding D1. The arbitration agreement is not referred to in the relevant passage in the judgment of the Arbitrazh Court; indeed, I have not found a reference to it anywhere in the judgment. Secondly, whether the

Russian judgment creates an issue estoppel in the present proceedings is a question of English law. An issue estoppel is not created by a decision against a successful party on an issue he lost: Spencer Bower and Handley, *Res Judicata* at paragraph 8.25. The Bank was the successful party in the judgment of 15 August 2011. Lastly, an estoppel arises only if the finding in question was fundamental and not collateral: *ibid.* at 8.23. The finding of the Arbitrazh Court in question was not fundamental, since it did not affect its decision to dismiss the Appellant's claim.

Delay

62. The judge addressed in some detail in paragraphs 93 to 105 of his judgment the question whether the Bank should have been refused relief by reason of its delay in seeking injunctive relief. He summarised his conclusions at paragraphs 104 and 105. In paragraph 104 he rejected some of the points sought to be made by the Bank, and he addressed the question whether its delay disentitled it to relief in paragraph 105:

> "105. The main factor, in my view, is as follows. On balance, I think it was reasonable for the claimant not to apply for an interim injunction at the time of seeking permission to serve the second defendant out of the jurisdiction. Though the first defendant is a party to a London arbitration, the jurisdiction issues as regards the second defendant were, as the claimant recognised when it made the application, likely to be complex ones. Once the proceedings were served, it became clear that jurisdiction would be strongly contested. It was apparent that evidence would be required on both sides, and that the questions relating to jurisdiction and service would take some considerable time to argue before the court—as indeed they did. If there was culpable delay, it lay in not applying for an interim injunction before the issues as to service and jurisdiction could be decided. But as the second defendant put it, on such an application the court would have to take a preliminary view on jurisdiction and grant (or withhold) interim anti-suit relief on that basis. As the first defendant contended however, there are difficulties inherent in such a course since before full argument of the kind that there has been on these applications, the court would have to make uninformed assumptions which might turn out to be misplaced. Objection has been taken by the first defendant that the threshold test even on an application for interim relief requires the applicant for an anti-suit injunction to establish 'a high degree of probability' that its case against the respondent is right and that it is entitled as of right to restrain the respondent from taking proceedings abroad. I accept that the defendants cannot be criticised for challenging jurisdiction on properly arguable grounds, but these challenges have set the framework for the timing. The difficult choice for the English court, as the court of the seat of the arbitration, is to consider making, or to decline to consider making, protective steps in support of the arbitral process. With some hesitation, I accept the submission

> of Mr Graham Dunning QC, counsel for the claimant, that delay should not itself preclude the bringing of the claimant's claim."

63. This question is not one of discretion, but of evaluation or assessment based on primary facts. Unless the judge's finding of the primary facts is shown to have been mistaken, this Court will interfere with the conclusion of the judge at first instance only if it is shown that he erred in law, or that he ignored a relevant factor or took into account an irrelevant factor, or if his conclusion was one that he could not reasonably or sensibly have come to.

64. In the present case, it is not suggested that the judge made any error in relation to the primary facts. The Appellant contends, first, that the judge failed to take into account the fact that the Bank's delay in seeking injunctive relief led to its incurring costs in the Russian Proceedings that would have been avoided if the Bank had acted earlier. I reject this criticism. If, as the Bank contends, the Appellant acted in concert with D1 with a view to subverting the arbitration or the enforcement of any arbitration award, its Russian costs were incurred by reason of its own wrongful conduct.

65. Secondly, it is submitted that the judge's conclusion was one that was not reasonably open to him. Like the judge, I find the issue of delay one of some difficulty, but I see no error or fault in the judge's consideration of the issue or his conclusion. It may well be that the facts of this case are at the outer edge of the acceptable, but given that the Bank's case against the Appellant is not straightforward, I agree with him that its delay was not such as to disentitle it to the protection of this Court. I would therefore uphold the judge's conclusion on delay.

Comity

66. The question of delay and that of comity are linked. It is a strong thing to preclude a defendant from pursuing proceedings in its foreign court when that court is already seised of the defendant's claim; it is an even stronger thing to do so if, as a result of delay on the part of the claimant in the English proceedings the foreign court has made a decision on the defendant's claim; and it is an even stronger thing to do so if the foreign court has found in favour of the defendant. In the present case, the demands of comity are mitigated by the fact that the Russian courts have found in favour of the Bank.

67. The importance of comity in the context of alternative forum anti-suit injunctions was discussed by Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA Civ 725 [2010] 1 WLR 1023, in a judgment with which Goldring and Carnwath LJJ agreed, at paragraph 50:

> "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 different 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."

68. In that case, the English claimant relied on a contract governed by English law with a non-exclusive English jurisdiction clause where there was little else to connect the dispute with England. In the present case, we have an exclusive jurisdiction clause, i.e., the arbitration agreement in the Guarantee, and if the Bank's case is well-founded, the Appellant has acted in concert with the contracting party in an attempt to subvert the recognition and enforcement of the arbitration award. I pay tribute to the evident care and impartiality with which the issues in the Russian Proceedings have been considered in the judgments of the Russian court that we have seen. However, the arbitration agreement was included in the Guarantee because the parties to it agreed that, subject to the Bank's option to bring proceedings in the courts of England, issues as to its validity should be determined by arbitration in England. If the Bank's case is well founded, the Appellant has been a party to the breach of the arbitration agreement by D1. The Bank is entitled to be protected from that breach, and in such a case, considerations of comity are of reduced importance. In my judgment, comity does not preclude the right of the Bank to an anti-suit injunction.

The jurisdictional gateways under the CPR

69. I shall consider first the gateway in PD6B 3.1(3): necessary or proper party.

70. The issue here is whether the Bank was able to establish that the claim form had been or would be served on D1 when it applied for permission to serve the Appellant out of the jurisdiction. It is conceded that the other requirements of this paragraph were met.

71. The Bank had not served the claim form on D1 when it made its application to Hamblen J. It asserted that it would be served. The Bank's difficulty is that its evidence that the claim form would be served on D1 assumed, wrongly, that the provision for service on Bryan Cave remained effective, when in fact it had been removed from the Guarantee.

72. The Appellant contends that, absent an agreement to accept service within the jurisdiction, unless a claimant has permission to serve a defendant out of the jurisdiction, it cannot show that the claim form "will be served" on that defendant so as to be within paragraph PD6B 3.1(3) in relation to a second defendant that is also out of the jurisdiction. As at the date of its application to Hamblen J, the Bank did not have permission to serve D1 out of the jurisdiction, and it therefore could not bring itself within the rule.

73. The Appellant's construction of PD6B 3.1(3) is supported by Briggs, *Civil Jurisdiction and Judgments*, 5th edition, at paragraph 4.57:

> "… until permission is obtained, it cannot be said, and therefore cannot be said in the witness statement, that D1 *will* be served."

74. In most cases, where there is a real question as to whether permission to serve out will be granted, this must be right. But this is not such a case. As Tomlinson J said in *Kyrgyz Republic Ministry of Transport Department of Civil Aviation v Finrep GmbH* [2006] EWHC 1722 (Comm) at paragraph 29:

> "… in relation to arbitration applications concerning arbitrations which have their seat within the jurisdiction it is the almost invariable practice of the court to permit service upon a party's solicitor who has acted for that party in the arbitration, provided that that solicitor does not appear to have been disinstructed or absent other special circumstances. This practice is reflected in paragraph 3.1 of Arbitration Practice Direction 62.4 which provides, under the rubric 'Arbitration Claim Form Service':
>
> > '3.1 *Service*. The court may exercise its powers under Rule 6.8 to permit service of an arbitration claim form at the address of a party's solicitor or representative acting for him in the arbitration.'"

75. I have no doubt that, if he had been asked, Hamblen J would have granted permission to serve D1 by service at its solicitors' address. The evidence is that it may take 2 years to effect service in Russia under the Hague Convention. As I understand it, service on D2 under the Hague Convention has still not taken place. The relief sought by the Bank required a speedy *inter partes* hearing that could not be achieved if service had to be effected under the Hague Convention. There was therefore good reason, as explained in *Cecil v Bayat* [2011] EWCA Civ 135 [2011] 1 WLR 3086 at paragraph 68, to order service by alternative means. If, therefore, immediately before the application to Hamblen J one had asked the question "Will D1 be served?" the answer would have been in the affirmative. This was what the judge meant when he said, in paragraph 54 of his judgment:

> "As a matter of fact, the words 'has been or will be served' were literally satisfied as regards the first defendant at the time of the 8 June 2011 order."

76. What was wrong with the Bank's application to Hamblen J under PD6B 3.1(3) was the Bank's error as to the continuing applicability of clause 17.2.1 of the Guarantee. That error went to the question where service would be effected on D1, but not, in the circumstances of this case, as to whether service would be effected.

77. Of course, if service on D1 were set aside, it would follow that service on the Appellant would also be set aside. The Appellant would no longer be a necessary or proper party to the claim against D1. However, service on D1 by service on Bryan Cave LLP was retrospectively validated by Blair J pursuant to CPR 6.15(2), and D1 has not appealed against the judge's order.

78. It follows, in my judgment, that the Court had and has jurisdiction over the Appellant as a necessary or proper party to the claim against D1.

Jurisdiction under CPR 62.5

79. My conclusion as to the applicability of PD6B 3.1(3), if Lloyd LJ and Sir Mark Potter agree with it, renders it unnecessary to address the issues relating to CPR 62.5, which are not straightforward. I propose, therefore, to leave them undecided.

***Forum conveniens*: is England the most appropriate forum to try the action for a final anti-suit injunction?**

80. This ground of appeal is linked to the issues of comity and delay. For the Appellant, it is contended that Russia is the only forum in which its claim to invalidate the Guarantee, which is a claim under Russian company law, can be determined. The Bank has participated in the Russian Proceedings, which are well advanced: indeed, decisions have been made in favour of the Bank at first instance and on appeal. Costs have been incurred by the Appellant in those proceedings. The allegation of bad faith and abuse made by the Bank against the Appellant has been rejected by the Russian Court.

81. I have already considered some of these factors. I reject the contention that Russia is the only available forum for the determination of the Appellant's invalidity claim. The claim that the Guarantee was not binding on D1 because the necessary corporate approvals had not been given, so that it was entered into without corporate authority, which is the essential claim made by the Appellant, is justiciable in this country. If there were no arbitration agreement, D1 or the Bank (if claiming relief) could rely on the gateways in PD6B 3.1(6)(c) and, more importantly, (d), and both D1 and the Appellant (if claiming relief) could rely on CPD6B 3.1(8). There is an arbitration agreement, but as mentioned above, rule 22.1(h) of the LCIA Rules would enable the Appellant to be joined in the arbitration, and I have little doubt that the agreement of D1 and of the Bank would have been forthcoming if the Appellant had requested joinder (although the agreement of either one would have sufficed). Moreover, the claim, in so far as it asserted that the approval of the Board of D1 was required, was raised (and has been determined) in the arbitration.

82. Once it is appreciated that the Bank is seeking to restrain parties acting in concert from subverting the valid English arbitration agreement binding one of them, like the judge I consider it obvious that this is the appropriate forum for determining its claim.

The appeal against the grant of an interim anti-suit injunction

83. I have already considered most of the Appellant's contentions on its appeal against the grant of injunctive relief. The only remaining submission is that the judge applied the wrong test when deciding that such relief should be granted: he applied the balance of convenience test when he should have required the Bank to establish that there was a high probability of its succeeding in establishing its case for a final anti-suit injunction. I reject this submission. In his second judgment the judge said:

> "7. Insofar as the merits are concerned, the first question on this application for an interim injunction is the test that I should

> apply. This is alluded to in various parts of the judgment (see for example paragraph 92). The possibilities are the *American Cyanamid* test, or the high probability of the success test which is mentioned, for example, in the *Midcult International Ltd v Groupe Chimique Tunisien* case and discussed in *The Anti-Suit Injunction* by Thomas Raphael to which I was referred by Ms Selvaratnam QC.
>
> 8. The higher test applies where an order for interim relief would be determinative of the matter. I do not think that the relief the claimant seeks is, in fact, determinative for these purposes, but if it is, I refer to the findings I have made in paragraph 92 of my judgment as to the inference which I have concluded can be drawn. I there accept that there is sufficient material to justify drawing the inference that the Russian proceedings are brought with a view to impeding the outcome of the arbitration. Nothing has happened over the past few days to weaken such inference. The events that have taken place are consistent with it and, if anything, lend it some strength. I consider that the threshold merits are satisfied in this case whichever test is applied."

84. It is evident from the last sentence of paragraph 8 that Blair J found that the higher test was satisfied. I agree with his assessment of the strength of the Bank's case against D1 and the Appellant. It follows that I see no basis for interfering with his decision to grant interim injunctive relief.

The appeal against the order of Teare J

85. Teare J carefully considered the case for and against the validation of the service of the claim form on the Appellant by the alternative means of its delivery to Bryan Cave LLP, who are now its solicitors, but were not acting for it at the date of its delivery. The Appellant (D2) has in fact been participating in the English proceedings since 27 June 2011, albeit without submitting to the jurisdiction. The claim form was served on the solicitors acting for it in these proceedings, who are also the solicitors who regularly act for the person who has ultimate ownership of the Appellant and has control over it. Service in this country involves no infringement of Russian law, which applies to service in Russia, and has no extra-territorial effect on service outside Russia. It is appropriate for proceedings such as the present to proceed to trial expeditiously, in the interests as much of the Appellant and D1 (if their defence of the Bank's case against them in these proceedings is well-founded) as the Bank. Teare J took into account that good reason is required to justify an order for service by alternative means against a foreign defendant, as explained by my judgment in *Cecil v Bayat*, and that the retrospective validation of such service requires even stronger grounds and a more exceptional case. I see no error of law or principle on his part, and I would therefore dismiss the appeal against his order.

Conclusion

86. For the reasons I have given above, I would dismiss these appeals.

Sir Mark Potter:

87. I agree.

Lord Justice Lloyd

88. I too agree that the appeals should be dismissed for the reasons given by Lord Justice Stanley Burnton. In particular I agree that it is sufficient to base our decision that jurisdiction was established on the proposition that the appellant was a necessary or proper party, without going into the issues which would arise on CPR 62.5.