Rimpacific Navigation Inc v Daehan Shipbuilding Co Ltd

The Jin Man

Wonder Enterprises Ltd v Daehan Shipbuilding Co Ltd

The Jin Pu

[2009] EWHC 2941 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

DAVID STEEL J

9, 10, 24 NOVEMBER 2009

Conflict of laws – Contract – Proper law of contract – Guarantees apparently given by defendant South Korean company in respect of third party's debts under charterparties – Defendant arguing that guarantees given without its authority under South Korean law – Claimants arguing that guarantees given with ostensible authority – Whether issue governed by English or South Korean law – Companies Act 1985, s 36.

Conflict of laws – Foreign proceedings – Restraint of foreign proceedings – Claimants suing defendant South Korean company in England under guarantees containing English law and jurisdiction clauses – Defendant claiming guarantees entered into without its authority – Defendant bringing parallel proceedings in South Korea seeking negative declaration – Whether injunction should be granted to restrain foreign proceedings.

Practice – Service out of the jurisdiction – Contract containing English law and jurisdiction clause – Defendant claiming that contract entered into on its behalf but without its authority – Defendant disputing validity of contracts – Whether English law and jurisdiction clause severable from main contracts for purposes of permission to serve – Whether necessary to have good arguable case as to existence of contracts – CPR PD 6B, para 3.1.

The claimant in the first action was a Panamanian company which owned the vessel 'Jin Man'. The claimant in the second action was a Liberian company which owned the vessel 'Jin Pu'. The claimants entered into two charterparties, in largely identical terms, pursuant to which each claimant agreed to charter the two vessels to the charterers. The defendant, a ship building company based in South Korea, was the guarantor of the charterers and had provided two written guarantees in respect of amounts due. Each of the guarantees was signed by O, the chief executive officer of the defendant, and contained an exclusive jurisdiction clause in favour of England. When the charterers

defaulted on payment, the matter was referred to arbitration and in due course awards were made in favour of the claimants. The claimants issued claims against the defendant relying on the guarantees and were given permission to serve the claim forms on the defendant in South Korea pursuant to para 3.1(6)(c) and (d) of CPR PD 6B[a], on the basis that the claims related to contracts governed by English law and contained an English jurisdiction clause. The defendant brought proceedings in South Korea seeking a declaration that it was not liable under the guarantees, on the basis that the guarantees were not binding. It argued that under South Korean law O lacked the authority to enter into the guarantees on the defendant's behalf. The defendant applied to the English court for a declaration that the English court had no jurisdiction to determine the claims. The claimants applied for anti-suit injunctions restraining the defendant from pursuing the related proceedings issued in South Korea, seeking to rely on the exclusive jurisdiction clause. The first issue was whether the matter was to be determined by reference to the validity of the guarantees or to the validity of the law and jurisdiction clauses. On that point the claimants submitted that the jurisdiction clause was a separable agreement from the guarantee agreement, and furnished the forum and legal basis to decide the validity of the guarantee, so that the court had the power to grant permission to serve outside the jurisdiction. If the matter was to be decided by reference to the contract of guarantee, the second issue was whether the claimants had a good arguable case as to the existence of the contract of guarantee for the purposes of service out of the jurisdiction. The defendant argued that South Korean law applied to determine that question. It relied on s 36[b] of the Companies Act 1985, as amended, under which a contract could be made on behalf of a company, by any person who, in accordance with the laws of the territory in which the company was incorporated, was acting under the authority 'express or implied' of that company. It argued that under South Korean law the claimants did not have a good arguable case. The third issue was whether an anti-suit injunction should be granted. The defendant argued that it should not as there had been undue delay on the part of the claimants in seeking the injunction.

Held – (1) The doctrine of separability did not apply. Under para 3.1 of CPR PD 6B, a good arguable case had to be made out that the contract existed. It was not enough to show that, if there was a contract (or a serious issue that there was a contract), it would arguably contain a law and jurisdiction clause. For the purposes of para 3.1 of CPR PD 6B, the relevant contract was the guarantee as a whole and not the law and jurisdiction agreement (see [22]–[24], below); *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456 and *Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm) applied; *Fiona Trust & Holding Corp v Privalov* [2007] 2 All ER (Comm) 1053 and *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2009] 2 All ER (Comm) 129 considered.

(2) The general rule was that the rights and liabilities of a principal as regards third parties were governed by the law applicable to the contract between the agent and the third party. In that regard, the amended s 36 effected no change as regards the governing law for the purposes of ostensible authority. It followed that English law applied to the question of whether there was an

a Paragraph 3.1 of CPR PD 6B, so far as material, is set out at [23], below

b Section 36, so far as material, is set out at [29], below

arguable case that O had ostensible authority. In the circumstances, the claimants had much the better of the argument that O had ostensible authority and that the contract existed (see [29]–[31], [34], below); *Azov Shipping Co v Baltic Shipping Co (No 3)* [1999] 2 All ER (Comm) 453, *SEB Trygg Liv Holding Aktiebolag v Manches* [2005] 2 Lloyd's Rep 129 and *Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial and Investment Bank* [2008] EWHC 1979 (Comm) considered; *Britannia Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98, *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737 and *Merrill Lynch Capital Services Inc v Municipality of Piraeus (No 2)* [1997] CLC 1214 applied.

(3) The claimants would be granted an anti-suit injunction restraining the defendant from pursuing its South Korean proceedings. Where there was a dispute as to the existence of an exclusive jurisdiction clause, the burden of establishing that pursuit of the proceedings was vexatious or oppressive would only be satisfied if the applicant could establish, on the material available, a strongly arguable case that its case on breach of an exclusive jurisdiction clause was well founded. In the instant case, the claimants had a high probability of succeeding on that issue. In the circumstances, there was a valid concern that if matters were allowed to continue in the South Korean court the authority of O would be considered without regard to English law and resulting adverse conclusions on his authority as a matter of South Korean law could constitute an issue estoppel. Although there had been delay, such delay did not constitute a prejudice to the defendant (see [67]–[71], below); *Donohue v Armco Inc* [2002] 1 All ER (Comm) 97 applied.

Notes

For service of a claim form outside the jurisdiction where the permission of the court is required, see 11 *Halsbury's Laws* (5th edn) (2009) para 170.

Section 36 of the Companies Act 1985 was repealed by the Companies Act 1006, s 1295, Sch 16 with effect from 1 October 2009.

Cases referred to in judgment

Azov Shipping Co v Baltic Shipping Co (No 3) [1999] 2 All ER (Comm) 453.

Benincasa v Dentalkit Srl Case C-269/95 [1998] All ER (EC) 135, [1997] ECR I-3767, ECJ.

Bols Distilleries (t/a Bols Royal Distilleries) v Superior Yacht Services Ltd [2006] UKPC 45, [2007] 1 All ER (Comm) 461, [2007] 1 WLR 12.

Britannia Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA [1984] 2 Lloyd's Rep 98, CA.

Canada Trust Co v Stolzenberg (No 2) [1998] 1 All ER 318, [1998] 1 WLR 547, CA.

Cherney v Deripaska (No 2) [2008] EWHC 1530 (Comm), [2009] 1 All ER (Comm) 333; *affd* [2009] EWCA Civ 849, [2009] NLJR 1138.

Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129.

Donohue v Armco Inc [2001] UKHL 64, [2002] 1 All ER (Comm) 97.

Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] 2 All ER (Comm) 1053.

FR Lurssen Werft GmbH & Co KG v Halle [2009] EWHC 2607 (Comm).

Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98, [1968] 1 QB 549, [1967] 3 WLR 1408, CA.

Mackender v Feldia AG [1966] 3 All ER 847, [1967] 2 QB 590, [1967] 2 WLR 119, CA.

Marubeni Hong Kong and South China Ltd v Mongolian Government [2002] 2 All ER (Comm) 873.

Merrill Lynch Capital Services Inc v Municipality of Piraeus (No 2) [1997] CLC 1214.

Presentaciones Musicales SA v Secunda [1994] 2 All ER 737, [1994] Ch 271, [1994] 2 WLR 660, CA.

Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial and Investment Bank [2008] EWHC 1979 (Comm).

Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1993] 4 All ER 456, [1994] 1 AC 438, [1993] 3 WLR 756, HL.

SEB Trygg Liv Holding Aktiebolag v Manches [2005] EWHC 35 (Comm), [2005] 2 Lloyd's Rep 129; *rvsd in part* [2005] EWCA Civ 1237, [2006] 2 All ER (Comm) 38, [2006] 1 WLR 2276.

Vitol SA v Arcturus Merchant Trust Ltd [2009] EWHC 800 (Comm).

Applications

Daehan Shipbuilding Co Ltd, a South Korean company, was the defendant in two sets of proceedings brought against it by the claimants, Rimpacific Navigation Inc, the owner of the vessel 'Jin Man', and Wonder Enterprises Ltd, the owner of the vessel 'Jin Pu', in which the claimants sought to enforce two guarantees dated 20 December 2007 given by the defendant in relation to the debts of Daehan Shipping Co Ltd which were due under charterparties of the vessels dated 21 September 2007. The defendant applied for an order that the court had no jurisdiction to entertain the proceedings. The claimants applied for an anti-suit injunction to restrain the defendant from pursuing proceedings in South Korea, in which it sought a declaration that it was not liable under the guarantees. The facts are set out in the judgment.

David Wolfson QC and *Michelle Menashy* (instructed by *McDermott Will & Emery*) for the defendant.

Vasanti Selvaratnam QC and *Sandra Healy* (instructed by *Ince & Co*) for the claimants.

Judgment was reserved.

24 November 2009. The following judgment was delivered.

DAVID STEEL J.

[**1**] There are two applications before the court. (i) The defendant's application made pursuant to CPR 11(1) for an order that the English court has no jurisdiction to determine the claims. (ii) The claimants' application for anti-suit injunctions restraining the defendant from pursuing related proceedings issued in South Korea.

[**2**] Rimpacific Navigation Inc, the claimant in Folios 295 and 1168, is a Panamanian company. It was at all material times the disponent owner of the vessel Jin Man. Wonder Enterprises Ltd, the claimant in Folios 296 and 1169, is a Liberian company. It was at all material times the disponent owner of the vessel Jin Pu. Rimpacific and Wonder are together referred to as the claimants.

[**3**] The claims relate to two charterparties dated 21 September 2007 on largely identical terms pursuant to which each claimant agreed to charter the two vessels to Daehan Shipping Co Ltd (the charterers).

[**4**] Clause 53 in each charterparty made provision for the charterers to furnish a guarantee letter from 'Daehan Cement' or 'Daeju Construction'. It is the claimants' evidence that the charterers in due course proposed that the guarantor of the charterparties be changed from Daehan Cement or Daeju Construction respectively to Daehan Shipbuilding Co Ltd (the defendant). This proposal was accepted by the claimants.

[**5**] The defendant provided two written guarantees dated 20 December 2007 in respect of all amounts due by the charterers under the respective charterparty. Each of the guarantees was signed by Mr Ie Su Oh. He was identified as the 'CEO/President' of the defendant and each guarantee bore what appeared to be an official stamp. Each guarantee contained a jurisdiction clause in the following terms: 'This guarantee shall be governed in every respect by English law. Any disputes arising under or in connection with this guarantee shall be referred to the exclusive jurisdiction of the English Courts.'

[**6**] As from about November 2008, in the wake of the collapse in the dry cargo freight market the charterers failed to pay hire due under the charterparties. In due course the claimants referred their claims for outstanding hire to arbitration in early 2009. Further the claimants issued claim forms on 5 March 2009 (Folios 295 and 296) against the defendant under the guarantees. On 13 March 2009 Gloster J granted the claimants permission to serve the claim forms on the defendant in South Korea.

[**7**] On 27 March 2009 the first arbitration awards were made in the claims brought by the claimants against the charterers. Wonder was awarded $4,774,187·50 plus interest and costs and Rimpacific was awarded $3,970,156·25 plus interest and costs in respect of outstanding hire.

[**8**] Shortly before the issuance of those awards the claimants purported to accept the charterers' repudiatory breach of the charterparties and terminated them. Two further arbitration awards were made dated 29 June 2009 by virtue of which the claimants were awarded sums in respect of damages. Wonder was awarded $16,215.266·78 plus interest and costs and Rimpacific was awarded $15,115,942·34 plus interest and costs.

[**9**] In the meantime, on 17 June 2009 the claimants were served with a complaint that in fact had been filed on 19 February 2009 by the defendant before the Seoul Central District Court for a declaration of non-liability under the guarantees. The claimants are currently disputing the jurisdiction of the Korean court to hear those claims.

[**10**] The claimants re-amended the claim forms in September 2009 to reflect the outcome of the first and second arbitration awards and obtained permission to serve the same out of the jurisdiction. On the same day new but identical proceedings against the defendant (Folios 1168 and 1169) were issued as a precautionary measure in the event that the claimants would not be able to serve the re-amended claims on the defendant prior to the expiration of validity of the claim forms.

SEPARABILITY

[**11**] At the heart of the dispute between the parties is the defendant's contention that the letters of guarantee on which the claimants rely are not (or strongly arguably are not) binding. Thus the first issue that arises is whether

the claimants have a good arguable case that there is jurisdiction under CPR PD 6B, para 3.1(6)(c) or (d). This in turn gives rise to a threshold point raised by the claimants. It is this. Is this issue to be determined by reference to the existence and validity of the guarantees or to the existence and validity of the law and jurisdiction clauses.

[**12**] In other words, the question arises as to whether the law and jurisdiction clause is potentially separable. The claimants in this regard rely by way of analogy on *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 2 All ER (Comm) 1053 and upon *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2009] 2 All ER (Comm) 129.

[**13**] In the *Fiona Trust & Holding Corp* case [2007] 2 All ER (Comm) 1053 owners sought to rescind charterparties, including arbitration agreements contained within them, on the grounds that they had been induced by bribery. The issue arose as to whether, assuming the owners had an arguable case that the charters had been validly rescinded, they also had an arguable case that the arbitration agreement had been rescinded as well.

[**14**] This in turn involved consideration of s 7 of the Arbitration Act 1996:

> '*Separability of arbitration agreement*. 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.'

[**15**] The House of Lords held that the arbitration clause survived the avoidance of the charterparties. The reasoning is set out in para [17] of the speech of Lord Hoffmann:

> '[17] The principle of separability enacted in s 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.'

[**16**] It was the defendant's case that Mr Oh had no authority to enter into the guarantees on the defendant's behalf because no board approval had been obtained. Thus it was submitted the arbitration clause stood or fell with the primary agreement. The claimants' response was that it was not suggested that Mr Oh as chief executive officer had no authority to enter into any guarantees

on the company's behalf let alone no authority to enter into an English law and jurisdiction agreement. Accordingly it was contended that the law and jurisdiction clause remained in existence and still furnished the forum and legal basis on which the question whether there was a concluded guarantee was to be decided.

[**17**] In this regard the claimants relied on the following passage in Lord Hoffman's speech:

> '[18] On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorised or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.'

[**18**] The claimants further submitted that this approach to severability was not confined to the field of arbitration and relied in that respect on the *Deutsche Bank* case [2009] 2 All ER (Comm) 129. Here a claim, falling within Council Regulation (EC) 44/2001 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L12 p 1), was brought on a credit agreement containing an English jurisdiction clause. The defendants contended that the agreement was void for want of authority on the part of the chairman who had signed it albeit that the clause expressly included disputes as to the 'existence, validity or termination' of the agreement.

[**19**] Having referred to *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 All ER 318, [1998] 1 WLR 547 and to *Bols Distilleries (t/a Bols Royal Distilleries) v Superior Yacht Services Ltd* [2006] UKPC 45, [2007] 1 All ER (Comm) 461, [2007] 1 WLR 12, Longmore J giving the first judgment accepted that the claimant had a much better argument than the defendants that the jurisdiction clause was the subject of 'consensus' between the parties for the purposes of art 23.

[**20**] He went on:

> '[24] The next proposition is that a jurisdiction clause, like an arbitration clause, is a separable agreement from the agreement as a whole. This is uncontroversial both as a matter of domestic law (see *Mackender v Feldia AG* [1966] 3 All ER 847, [1967] 2 QB 590 and *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40, [2007] 2 All ER (Comm) 1053) and as a matter of European law (see *Benincasa v Dentalkit Srl* Case C-269/95 [1998] All ER (EC) 135, [1997] ECR I-3767 and Briggs and Rees *Civil Jurisdiction and Judgments* (4th edn, 2005) esp p 131 (para 2–105)). It follows that disputes about the validity of the contract must, on the face of it, be resolved pursuant to the terms of the clause and, indeed, the last sentence of the clause expressly so provides. It is only if the jurisdiction clause is itself under some specific attack that a question can arise whether it is right to invoke the jurisdiction clause. Examples of this might be fraud or duress

alleged in relation specifically to the jurisdiction clause. Another example might be if the signatures to the agreement were alleged to be forgeries, although no authority has so far so stated. Even in such a case someone has to decide whether the signatures were in fact forged. It might well be thought that a mere allegation to that effect could not have the effect of rendering a jurisdiction clause inapplicable.'

[**21**] In the result, all the claims were held to fall within the terms of art 23 and fell within the jurisdiction of the English court.

[**22**] The defendant submits that the doctrine of separability is of no application to cases such as the present. In short it was contended: (i) the underlying principles are to be derived from *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456, [1994] 1 AC 438 which held that the standard of proof for the purposes of establishing long-arm jurisdiction under the Rules of the Supreme Court was one of good arguable case. This in turn requires in a contractual claim sufficient proof of the existence of the relevant contract: see [1993] 4 All ER 456 at 466, [1994] 1 AC 438 at 455 per Lord Goff of Chieveley; (ii) in this context the requirements of RSC Ord 11 and its successor CPR Pt 6 are quite distinct from the provisions of s 7 of the 1996 Act and arts 17 and 23 of Regulation 44/2001. In particular the emphasis is not so much on the existence of a jurisdiction or arbitration clause but on whether there is a sufficient nexus with the jurisdiction of this court to justify service out; (iii) this is further demonstrated by recent cases involving issues of a similar kind containing no hint let alone argument that the concept of separability has any application: see *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2002] 2 All ER (Comm) 873 and *Vitol SA v Arcturus Merchant Trust Ltd* [2009] EWHC 800 (Comm).

[**23**] I prefer the defendant's stance on this issue. CPR PD 6B, para 3.1(6) provides for service out of the jurisdiction where, inter alia, '[a] claim is made in respect of a contract' where the contract '(c) is governed by English law; or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract'. It follows in my judgment that a good arguable case must be made out that the contract existed. It is not enough to show that, if there is a contract (or a serious issue that there is a contract), it would arguably contain a law and jurisdiction clause. The 'relevant' contract in the present proceedings is the guarantee as a whole and not the law and jurisdiction agreement.

[**24**] The matter is summarised with characteristic clarity in the judgment of Aikens J in the *Marubeni Hong Kong and South China* case [2002] 2 All ER (Comm) 873 where it was contended that the relevant guarantee which contained an English jurisdiction clause had been executed without actual or ostensible authority:

'[15] Mr White QC accepted that the claimants have to satisfy the court that there is a "good arguable case" that the contract being sued upon has in it a term to the effect that the court shall have jurisdiction to determine the claim in respect of the contract: see *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 4 All ER 456 at 465, [1994] 1 AC 438 at 454 per Lord Goff of Chieveley. This means that the claimants have to prove that there is more to their case than the existence of a "triable issue". But the claimants do not have to prove at this stage that, on a balance of probabilities, there is a valid contract and a jurisdiction clause in

> it. Mr White also accepts, for the purposes of this application, that the relevant sentence in the guarantee of 11 May 1996 would constitute an English jurisdiction clause. (The question of whether it was an *exclusive* jurisdiction clause was left open.) Therefore the issue is whether there is a good arguable case that the guarantee is a valid contract at all.' (My emphasis.)

[**25**] Any other approach would give rise to the surprising if not absurd result that a claimant would have to show a good arguable case as to the existence of a contract for 'gateway' 3.1(6)(a) (a claim in respect of a contract where the contract was made within the jurisdiction) but not for the purposes of 'gateway' 3.1.(6)(d).

GOOD ARGUABLE CASE

[**26**] There is no issue as to what constitutes a good arguable case for the purposes of service out in so far as the very existence of the relevant contract is in dispute as here. The claimants must satisfy me that they have much the better of the argument on the material available: see the *Canada Trust* (*No 2*) case [1998] 1 All ER 318, [1998] 1 WLR 547, *Bols Distilleries v Superior Yacht Services Ltd* [2007] 1 All ER (Comm) 461, *Cherney v Deripaska* (*No 2*) [2008] EWHC 1530 (Comm), [2009] 1 All ER (Comm) 333 and *FR Lurssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm).

[**27**] It is accepted solely for the purposes of this application that as a matter of Korean law Mr Oh had no actual authority to execute the guarantees. This is said to be the case for two reasons but primarily because he was a 'representative director' of the guarantor company and of the primary debtor and, in those circumstances the board approval by the defendant was not obtained as required by the Korean Commercial Code (KCC).

[**28**] It is the claimants' case that Mr Oh acted within his ostensible authority as a matter of English law and that English law is the governing law for determining this issue as being the putative proper law of the guarantees. The defendant challenges this proposition. It is their case that all questions of Mr Oh's authority are governed by Korean law and by that law he had no actual or apparent authority.

[**29**] As I understand their primary case, the defendant accepted that as a general rule the rights and liabilities of a principal as regards third parties are governed by the law applicable to the contract between the agent and the third party. But, it was submitted, this rule is not applicable to companies by virtue of s 36 of the Companies Act 1985, as modified by regs 3 and 4 of the Foreign Companies (Execution of Documents) Regulations 1994, SI 1994/950. This provides:

> 'Under the law of England and Wales a contract may be made … (b) on behalf of a company, by any person who, in accordance with the laws of the territory in which the company is incorporated, is acting under the authority (express or implied) of that company …'

[**30**] The defendant contended that the expression 'express or implied' refers to all concepts of authority inclusive of ostensible authority, and accordingly that Mr Oh's ostensible authority was governed by Korean law.

[**31**] In my judgment, the regulations introduced in 1994 effected no change as regards the governing law for the purposes of ostensible authority: (i) such was common ground in *SEB Trygg Liv Holding Aktiebolag v Manches* [2005]

EWHC 35 (Comm) at [18], [2005] 2 Lloyd's Rep 129 at [18] per Gloster J and the contrary was not argued before Andrew Smith J in *Sea Emerald SA v Prominvestbank – Joint Stockpoint Commercial Industrial and Investment Bank* [2008] EWHC 1979 (Comm) at [106]; (ii) the proposition was expressly considered and rejected by Colman J in *Azov Shipping Co v Baltic Shipping Co (No 3)* [1999] 2 All ER (Comm) 453 at 472:

> 'It was further argued on behalf of Baltic that, if the agreement were not invalid under Ukrainian law, then even if there were no actual authority, there was ostensible authority and, in view of the proper law of the GUCA being English law, Azov was bound by the GUCA on that basis. An issue was raised whether the effect of the 1994 Regulations extending ss 36, 36A and 36C of the Companies Act 1985 to foreign corporations to which I have already referred was to exclude the doctrine of ostensible authority in a case where the putative contract was governed by English law. I do not consider that to be the effect of the statutory instruments. If it had been the intention to disapply the doctrine of ostensible authority where the putative contract was governed by English law, which is a reasonably well-established principle in English conflicts rules (see *Dicey and Morris on the Conflict of Laws* (12th edn, 1993), pp 1458–1462) express provision to that effect would surely have been included.'

[**32**] The defendant submitted that this decision was obiter, not fully argued and wrong. Albeit strictly speaking obiter, I have little hesitation in accepting it as fully persuasive. It is noted with approval in *Dicey*. At the very least it confirms for present purposes that the claimants have very much the better of the argument.

[**33**] The alternative proposition advanced by the defendant, at least in their skeleton argument, was that the general rule specified in r 228 of *Dicey* was 'questionable'. If and in so far as this submission is maintained I reject it if only on the basis that the claimants have very much the better of the argument since the claimants' stance is consistent with both authority and business sense.

[**34**] It is sufficient for those purposes to refer to the following authorities:

(i) *Britannia Steamship Insurance Association Ltd v Ausonia Assicurazioni SpA* [1984] 2 Lloyd's Rep 98 at 100:

> 'Once it is accepted that English law was the proper law of the contracts, if contracts had been entered into, then it seems to me that it is for English law to decide whether the conduct of the two "managers" of the defendants who had signed the agreements had been so held out by the defendants as to give rise to a valid plea of ostensible authority, or whether the conduct which has been referred to in summary by the learned Judge was such as, under English domestic law, to have amounted to a ratification of the disputed contracts. This does not seem to me to involve the application of any English private international law' (Per Ackner LJ.)

(ii) *Presentaciones Musicales SA v Secunda* [1994] 2 All ER 737 at 749, [1994] Ch 271 at 283 approved a passage from the twelfth edition of *Dicey* (1993) p 1459 as follows:

> 'Where A [the agent] lacks actual authority from P [the principal], it seems right, in principle, that the law applicable to the contract between A [the agent] and T [a third party] should determine whether P [the principal] is bound (or entitled). In effect in this situation, one is asking

> whether A [the agent] had apparent or ostensible authority to bind P [principal] … As between P [the principal] and A [the agent], the scope of A's [the agent's] authority to bind P [the principal] and to confer rights upon him is necessarily determined by the law which governs their relationship, but third parties must be able to assume, at least where A [the agent] has no actual authority from P [the principal], that A's [the agent's] authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party.'

(iii) In *Merrill Lynch Capital Services Inc v Municipality of Piraeus (No 2)* [1997] CLC 1214 at 1231, Cresswell J stated in terms: 'Questions of ostensible authority, ratification and estoppel are governed by English law as the putative proper law.'

(iv) The latest edition (14th) of *Dicey* draws the thread of some of these authorities together at pp 1851–1852 (paras *33–432–33–433*) and identifies the fact that the outcome is consistent with the requirements of business needs:

> '**English Conflicts rules**. Where A lacks actual authority from P, it seems right, in principle, that the law applicable to the contract between A and T should determine whether P is bound (or entitled). In effect in this situation, one is asking whether A had apparent or ostensible authority to bind P. Hence, if P in one country appoints A to act for him as regards certain matters, eg the sale and purchase of goods, in a specified or unspecified number of countries, A must be taken to have the authority to do any of the acts which an agent of his class may do under the law of that country with reference to the laws of which he contracts. This responds to the requirements of commercial intercourse. As between P and A, the scope of A's authority to bind P and to confer rights upon him is necessarily determined by the law which governs their relationship, but third parties must be able to assume, at least where A has no actual authority from P, that A's authority covers everything which would be covered by the authority of an agent appointed under the law applicable to the contract made between the agent and the third party …
>
> Again, the extent to which A must be deemed to be authorised by P to sell property on his behalf or enter into other contracts, ie the definition of A's ostensible authority, is a matter for the law applicable to the contract which he concludes, as are the consequences of lack of authority and the effect of later ratification.'

OSTENSIBLE AUTHORITY

[**35**] There was of course no material issue as to the principles of ostensible authority as a matter of English law. It is often categorised as a species of estoppel. Where a person represents that another has authority to act on his behalf, he is bound by that person's acts if anyone deals with him as an agent in reliance on that representation even though he (the agent) had no actual authority.

[**36**] For present purposes it is to be accepted that Mr Oh had no actual authority because there was no board approval. Such approval was required either under art 398 of the KCC because Mr Oh was an 'interested director' in the sense of being a director of the chartering company and the guarantor company or under the articles of incorporation (AOI) of the defendant company because of the potential financial implications of the guarantees.

[**37**] As regards ostensible authority the claimants relied upon the following matters as establishing the appropriate representation, manifestation or holding out. (i) There had been an earlier guarantee issued by the defendant in October 2006 which had been signed by Hynn Tae Shin as 'President' and which had been stamped. Likewise a guarantee by an associate company had been issued (stamped but not signed) in June 2007. No suggestion had been made that such were unenforceable. (ii) Mr Oh signed the present guarantee expressly as 'CEO/President'. A stamp or chop had also been applied (albeit different from the earlier ones). (iii) This designation as 'CEO/President' is a translation of the Korean title 'daepyo isa' which is perhaps better rendered as 'representative director'. The KCC confirms that a representative director has broad authority and is authorised in principle to represent the company in 'all judicial and extra judicial acts relating to the company's business'. (iv) Whilst there can be limitations imposed by the KCC or internal regulations requiring sanction by the board for a specific transaction, the position as summarised by the claimants' Korean lawyer and unchallenged is as follows:

> 'Prof Chan-Hyung Chung, a renowned legal scholar in commercial law, states in his book, titled Lecture on Commercial Law (I) (page 851, 12th edition) [CJK3/7] that *"a representative director of company carries out decisions made by the board of directors and decides and executes day - to - day business matter and matters for which he is generally and specifically authorized (or delegated) to do by the board of directors."* It is an established view under Korean law and practice in respect of the authority of representative director and in practice, it means that a representative director can do all the things the board of directors can do on behalf of the company.'

[**38**] In these aspects the position is analogous to the usual authority of a managing director as a matter of English law. In a characteristically straightforward way, Lord Denning MR explained the principle in *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 at 102, [1968] 1 QB 549 at 583:

> 'Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation.'

[**39**] Against that background the claimants submit that they have a formidable case on apparent or ostensible authority in that Mr Oh had been appointed to a specific position which usually carried with it actual authority to contract on the company's behalf. The defendant submits none the less that no ostensible authority arose for two reasons. (i) Since there was no actual

authority as a matter of Korean law, there could be no ostensible authority as a matter of English law. (ii) The claimants ignored the opportunity to ascertain the true extent of Mr Oh's actual authority.

[**40**] As regards (i), the extent of Mr Oh's authority as a matter of English law is that which he reasonably appeared to have. This obviously legitimately takes into account his apparent status and normal authority. The mere absence of actual authority (unknown to the claimants) begs the question.

[**41**] As regards (ii), the defendant relies on three matters: (i) the potential exposure under the guarantees; (ii) the change in terms of the signatory and the stamp from the earlier guarantee; (iii) the information made available as regards the status of Mr Oh within the charterers' organisation.

[**42**] I do not regard these matters as giving the defendant anything approaching the better of the argument on ostensible authority. (i) The exposure under the guarantees is put forward as $80m being no more than a calculation of the gross hire payable over the life of the charterparties. But the charter was entered into on a bull market where the prevailing sub-charter rates readily absorbed the charter hire exposure. Furthermore it was the charterers themselves who had proposed the change of guarantor to another company in the group. (ii) The change in the identity of the signatory and stamp would have been perceived as of marginal interest not least because the present guarantee was executed over a year after the earlier one. (iii) The suggestion that the claimants were aware of Mr Oh's dual status only emerged during argument by reference to an e-mail from Maersk, acting as charterers' brokers, forwarded to members of the claimants' staff. It quoted an e-mail from charterers signed 'Yasoo Oh/CEO' (in contrast to 'Oh le Su – CEO/President' in the guarantee as executed). In my judgment this is thin material on which to base an allegation of awareness on the part of the claimants of joint directorship. But even if that fact was apparent despite the difference in name, it does little if anything to suggest that the claimants ignored the opportunity of ascertaining the consequential limitation on Mr Oh's authority to execute the guarantee.

[**43**] For all those reasons I conclude that the claimants have much the better of the argument on the existence of the relevant contract.

KOREAN LAW

[**44**] Strictly speaking this makes it unnecessary to consider the claimants' submission that, even if Korean law was applicable, they none the less have much the better of the argument on the existence of the relevant contract. But in case I am wrong on the applicable law, I deal with the alternative submission which was fully argued against the background of detailed evidence of Korean law adduced by both sides.

[**45**] Where the court is faced with written evidence of foreign law expressing confident but contrary views it may sometimes not be possible for the court to conclude that one or other party had much the better of the argument on the issues concerned. But in my judgment the present case does not furnish such an example.

INTERESTED DIRECTORS TRANSACTION

[**46**] Article 398 of the KCC provides: 'A director may effectuate a transaction with the company for his own interest or for the interest of a third person only if he has obtained the approval of the board of directors.'

[47] This provision has been construed by the Korean courts (see *Supreme Court Judgment 84 Daka* dated 11 December 1984) as also applicable to a case where a person holding the position of representative director of two separate companies 'jointly and severally guarantees the obligations of one company on behalf of the other'.

[48] It is common ground that Mr Oh was a representative director of both the defendant and the charterers. It is accepted for the purposes of this hearing that no approval of the board was obtained. However the experts agree that Korean law affords protection for third parties acting in good faith—that is to say without knowledge that the approval of the board has not been obtained. Thus a Korean court would only consider the guarantees not to be binding on the defendant if the defendant established either that the claimants were aware of or alternatively grossly negligent in remaining ignorant of the fact that (a) the issuance of the guarantee was an interested director transaction and (b) approval of the board had not been obtained.

[49] This proposition is derived from *Supreme Court Judgment 2003 Da 64688* dated 25 March 2004. Further the judgment contained within it an analysis of the scope and meaning of gross negligence:

> 'Here, gross negligence indicated circumstances where the duty of care commonly expected of a transaction was significantly breached by the third party who could have, with the slightest attention, become aware that the aforementioned transaction was one executed between the director and the company that requires the approval of the Board of Directors and such an approval had not been obtained, but simply chose to believe that such an approval had been obtained, and accordingly, from the perspective of fairness, it is acknowledged under such circumstances that the protection of the third party is not particularly necessary.'

[50] There was some dispute about the accuracy of this translation but nothing in my judgment turns on it.

LIMITATION OF AUTHORITY UNDER THE AOI

[51] Although a representative director is afforded broad authority under the KCC, limitation can be imposed by the shareholders by virtue of the AOI. Article 23–8 of the AOI of the defendant requires a resolution passed by the board of directors in respect of any 'matter having significant effects on the profit/loss of the company'. Again, it is accepted for the purposes of this application that no such resolution was passed.

[52] Nevertheless, art 209(2) of the KCC provides that the official acts of a representative director are enforceable against a company by a third party acting in good faith notwithstanding the existence of limitations on the authority of the representative director.

[53] This provision was considered in Korean *Supreme Court Case No 93 Da 13391* dated 25 June 1993. It was held that where—

> 'the representative director of a company carried out an effective transaction without obtaining the required Board approval, such transaction is interpreted as effective, unless the other party of the transaction was aware or could have known that there was no board approval and such bad faith of the other party should be assessed and proven by the company.'

Albeit not expressed in terms of gross negligence, it appears to be common ground on the Korean law evidence that such is the criteria against which the question as to whether the third party 'could have known' is properly to be tested.

GROSS NEGLIGENCE

[**54**] The decision in *2003 Da 64688* cited above appears to contemplate various steps which the defendants would have to establish to allege gross negligence successfully: (i) the claimants simply chose to believe that any necessary approval had been obtained; (ii) 'with the slightest attention' they could have been aware (a) the board approval was necessary and (b) that board approval had not been obtained; (iii) in the circumstances protection of the claimants is not necessary 'from the perspective of fairness'.

[**55**] An authoritative commentary on the case was cited which contained three illustrative examples of gross negligence. But I did not derive much assistance on any suggested analogy in what by any standards is a very fact-sensitive area. Indeed the facts of the cited case were very striking:

> 'However, the facts of the Supreme Court Judgment 2003Da64688 should be distinguished from the assumed facts of the present matter; in that case (i) the director of the company issued a promissory note to himself in the name of the company and it was obvious to third party, the bank (namely, the Industrial Bank of Korea), that it was solely for his own benefit since it was to secure his personal loan from the bank; (ii) there was a manual for the bank to confirm the approval of the board of directors in such cases; and (iii) the employee at the bank knew that the director issued the promissory note on behalf of the company in favour of himself and endorsed it to the bank on the same day.'

[**56**] The need for gross negligence as opposed to mere lack of care is accepted. It is implicit in the need for the true position to be available 'with the slightest attention'. In this respect the defendant's principal complaint is that the claimants made no inquiries. I am not persuaded of the need for that or at least that the claimants have much the better of the argument on the point.

[**57**] As a matter of Korean law, I was attracted by the proposition advanced by the claimants' lawyer that assistance in this regard could be derived from Korean *Supreme Court Case No 2005 Da 3649* where the issue was whether 'with the slightest attention' a third party could have been aware that the purported conveyance of a substantial asset by a representative director required approval by the board:

> 'regarding transactions with a company, it is common and ordinary for the representative director of the company to fulfil all the necessary internal decision-making process before carrying out a legal act on behalf of the company, and it is difficult to presume that there is a positive duty for the contracting counterparty to ascertain whether these is any limitation to the authority of the representative director.'

[**58**] This approach is further supported by a commentary contained in a book entitled *'All Disputes Concerning Notes and Cheques' Archive No. 30 of Materials for Judgments'* (published by the Korean National Court Administration):

> 'since it cannot be deemed that the third party has a duty of care to check the existence of approval of the board of directors for every transaction he makes with the representative director on behalf of the company, just a simple degree of negligence [but not gross negligence] shall not be sufficient to exclude the third party from the protection under the law.'

INTERESTED DIRECTOR

[**59**] As already indicated the defendant placed considerable reliance in support of their case that 'with the slightest attention' the claimants would have become aware of Mr Oh's dual role as a representative director of both companies on the internal Maersk e-mail transmitted on to Mr Norman Wu of the claimants. This point emerged so late that the claimants had understandable difficulty in responding to it. The mere fact that the proposition was only advanced in oral argument is a strong pointer to the lack of merit in the point.

[**60**] The e-mail had been attached to a witness statement of Mr Lam Ting Pong dated 7 September 2009. In a supplemental statement dated 10 November he states that he was not aware that Mr Yasoo Oh and Oh le Su might be the same person. As already observed that is not remotely surprising.

[**61**] In short the defendant has difficulty in getting past first base. Even if the penny had dropped that Mr Oh was one and the same and thus chief executive officer of both companies, there would remain other supplemental hurdles facing the defendant in making good a case of gross negligence such that it would be fair not to afford protection to the claimants. (i) Even a Korean company would probably need legal advice to identify the requirement for board approval. Such is not, as noted, apparent from the express terms of art 398 of the KCC but only from decisions of the Supreme Court. (ii) The claimants were a foreign shipping company. The negotiations for both the charterparties and the guarantees had been conducted in English. Yet the materials relating to the company and the applicable law were in Korean. Even allowing for the need to treat Korean and non-Korean companies even-handedly, at present I prefer the view of the claimants' lawyer that in reviewing the justice of the matter this would be a material consideration. (iii) Similar guarantees by the defendant or an associate company had been issued earlier with no suggestion that the signatory had exceeded his authority or had avoided doing so by getting board approval. (iv) There was nothing in the nature of the transaction which would have put the claimants on inquiry as to whether it was not in the commercial interests of the defendant. The terms of the charterparty and the level of the market would provide a substantial profit to the charterers more than outweighing the risks of a call on the guarantees. There was no contemplation of any significant fall in freight rates. Indeed the index had increased to 10995 in November 2007 and went on up to 11771 in May 2008.

AOI

[**62**] Similar considerations apply to the alternative basis upon which board approval was required. But one or two further matters are pertinent. (i) It is a threshold requirement that the guarantees were matters 'having substantial effect on the profits/loss of the company'. In one sense, given the collapse in

the dry freight cargo market (the index bottomed out at 600 in December 2008), the requirement is made out. But as already observed the perceived market fundamentals in December 2008 were strong. It was not until the collapse of Lehman Brothers in September 2008 that the bull run ended. In the meantime substantial profits were being made. (ii) The AOI are not in the public domain. Accordingly the restriction on a representative director's authority was not readily accessible.

SERIOUS ISSUE TO BE TRIED

[**63**] The defendant submits that the claimants' claim on the merits had no more than a fanciful prospect of success. This submission appears to be based in the proposition that the claimants were seeking to recover on the arbitration awards to which the defendant was not of course a party.

[**64**] I do not think any fair reading of the particulars of claim, amended or otherwise, leads to that conclusion. The claimants seek to recover both unpaid hire and damages, the quantum of which is evidenced by the awards.

CONCLUSION

[**65**] For all these reasons I reject the defendant's challenge to the jurisdiction of the court.

ANTI-SUIT INJUNCTION

[**66**] The claimants have a counter-application seeking an order restraining the defendant from pursuing their claim for declaratory relief in Korea, in short an anti-suit injunction.

[**67**] The principles are contained within *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER (Comm) 97 and need no further recitation. Where there is a dispute as to the existence of an exclusive jurisdiction clause, I accept that the burden of establishing that pursuit of the proceedings is vexatious or oppressive will only generally speaking be satisfied if the applicant can establish (on the material available) a strongly arguable case that its case on breach of an exclusive jurisdiction clause is well founded. I have already made a finding to the effect that the claimants have very much the better of the argument on the existence of the contract which unquestionably contains a jurisdiction clause. If necessary I would conclude that the claimants have a high probability of succeeding on the issue.

[**68**] In the circumstances the claimants are justified in their concern that if matters were allowed to continue in the Korean courts the authority of Mr Oh would be considered without regard to English law and resulting adverse conclusions on his authority as a matter of Korean law could constitute an issue estoppel.

[**69**] The defendant contended however that there has been undue delay. The Korean proceedings were served on 17 June 2009 but the application for an anti-suit injunction was not filed until 4 September. I accept that this was somewhat on the slow side even allowing for the intervention of the long vacation. Indeed the jurisdictional challenge to the English proceedings based on the allegation of want of authority was taken out on 31 July.

[**70**] But importantly I do not regard the delay as prejudicial. There had been no advance in the Korean proceedings meanwhile. Indeed little progress has been made since although partly by consent in the face of the present application. But in any event it appears that the civil proceedings in Korea (in

respect of which there is a dispute as to whether a jurisdictional issue could and would be taken in advance of consideration of the merits) will now have to await the outcome of criminal proceedings against Mr Oh.

[**71**] It follows that I would grant relief to the claimants in the form of an anti-suit injunction subject to submissions on its precise form.

Order accordingly.

Rakesh Rajani Barrister.