QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

13 July 2012

JEWEL OWNER LTD AND ANOTHER
v
SAGAAN DEVELOPMENTS TRADING LTD
(THE "MD GEMINI")

[2012] EWHC 2850 (Comm)

Before Mr Justice POPPLEWELL

Practice — Anti-suit injunction — Bunker supplier commencing proceedings against shipowners in Florida and in the Marshall Islands for price of bunkers supplied to time-charterers — Shipowners obtaining ex parte anti-suit injunction — Whether bunker supply contract contained exclusive English jurisdiction clause — Whether foreign proceedings vexatious or oppressive on forum non conveniens grounds — Whether injunction should be continued.

The first claimant owners were a Bahamian corporation with a place of business in Florida. They were also registered in the Marshall Islands as a foreign maritime owning entity. The second claimant (ISP) acted as technical managers for the owners.

The owners chartered out their passenger vessel, then known as *Vision Star* and now known as *MD Gemini*, on the Baltime form, which provided for New York arbitration.

The defendant (Sagaan) was the unpaid supplier of bunkers to the time-charterers of the vessel. All the relevant bunkers had been consumed by the time the vessel was re-delivered to the owners on 21 October 2011.

On 11 November 2011 Sagaan's solicitors wrote to the owners' solicitors claiming that the owners were liable for the price of the bunkers. The owners' solicitors responded that the charterers alone were liable to pay for the bunkers.

The bunker supply contract incorporated Sagaan's standard terms and conditions, clause 19.1 of which provided:

> "Governing law: Save that the seller may take such action or actions as it shall in its absolute discretion consider necessary to enforce, safeguard or secure its rights hereunder in any court or tribunal or any state or country, the provisions hereof shall be governed by the law of England and the jurisdiction of the English courts."

On 26 October 2011 Sagaan brought proceedings in the US District Court for the Southern District of Florida against the owners and ISP, as well as against the charterers. The claim was for the price of the bunkers both as a contractual claim and under various other alleged causes of action.

On 31 October 2011 Sagaan brought proceedings in the High Court of the Republic of the Marshall Islands. Those proceedings were both in rem against the vessel, asserting a maritime lien, and in personam against the owners, claiming the price of the bunkers.

On 12 December 2011 Sagaan issued a motion to stay the Marshall Islands proceedings on, inter alia, the ground of forum non conveniens. Sagaan said that there was an adequate alternative forum existing, ie Florida, which possessed jurisdiction over the whole case. Sagaan asserted that the Southern District of Florida was the more suitable jurisdiction for the lawsuit.

On 29 December 2011 the owners entered an answer to the complaint in the Florida proceedings. The answer denied that the owners were party to any agreement to supply bunkers by Sagaan, and averred that the bunkers had been stemmed by the charterers, who were the sole party liable under the agreement. The owners said that, without prejudice to their defences, the transaction was subject to the jurisdiction of the English courts, and they sought dismissal of the complaint on its merits. ISP filed an answer in similar terms.

On 10 February 2012 the Marshall Islands High Court stayed the proceedings on the ground that the Florida action addressed the underlying cause of action, and was an adequate forum to address the plaintiff's claims.

Thereafter, in the Florida proceedings, the owners and Sagaan agreed a timetable for directions through to a trial of the claim on its merits, and on 6 June 2012 the Florida court made a scheduling order setting out a schedule for the progress of the proceedings through to trial.

On 27 June 2012 the owners and ISP (the claimants) applied, by giving two hours' notice by email, to the English Commercial Court for permission to serve a claim form on Sagaan out of the jurisdiction and for an anti-suit injunction.

Eder J made an order granting the claimant an anti-suit injunction restraining Sagaan from pursuing proceedings in Florida and the Marshall Islands or elsewhere other than in England.

On the return date Sagaan submitted that the injunction should not be continued. Clause 19.1 of the bunker supply contract was not an exclusive English jurisdiction clause. Nor was it vexatious or oppressive to allow the foreign proceedings to continue. Moreover, there had been delay in bringing the application for an anti-suit injunction.

————*Held* by QBD (Comm Ct) (POPPLEWELL J) that the anti-suit injunction would not be continued.

(1) A contractual exclusive jurisdiction clause ought to be enforced unless there were strong reasons not to do so. In the absence of such a clause, the court would generally only restrain the claimant from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive on grounds of forum non conveniens on the basis that: (a) England was clearly the more appropriate form (the natural forum); and (b) justice required that the claimant in the foreign court should be restrained from proceeding there (*see* paras 13 and 14);

————*Turner v Grovit* [2002] 1 WLR 107, *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749 and *Deutsche Bank AG v Highland Crusader Offshore Partners LLP* [2009] 2 Lloyd's Rep 617; [2010] 1 WLR 1023 considered.

(2) The owners were entitled to be put in the same position as if they were parties to the bunker supply contract containing clause 19.1 notwithstanding their averment that they were not a party. It would generally be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contained an exclusive jurisdiction clause in favour of England to seek to enforce the rights under that contract without giving effect to the jurisdiction clause which was part and parcel of that contract notwithstanding that the party being sued maintained that it was not a party to that contract. However, on its true construction, clause 19.1 was not an exclusive jurisdiction clause (*see* paras 15 and 19).

(3) It would not be vexatious or oppressive to allow the foreign proceedings to continue. The English court could not be put forward as anything more than a convenient forum; it was not the natural forum. The fact that the Miami court might apply law other than English law was a matter for the Miami court. The District Court of the USA was well capable of applying English law, if it be the proper law, and of applying appropriate conflicts rules which were in accordance with international principles of comity. Nor was there any oppression in the fact that two sets of proceedings had been commenced, not least because, in any event, the Marshall Islands proceedings had now been stayed so that there was only one set of foreign proceedings on foot (*see* para 21).

(4) Even if clause 19.1 were properly to be construed as an exclusive jurisdiction clause there were other good reasons why the injunction should not be continued:

(a) The owners had delayed in making their application for an anti-suit injunction. There was no reason why the application should not have been made at the end of 2011. It would have been apparent from the time when the claim was first advanced that Sagaan might seek to take measures to secure its claim in whatever jurisdiction the substantive merits fell to be decided. By October 2011 it was apparent that Sagaan was pursuing its claim on the merits in the Marshall Islands and in Florida. The time to make an application to the English court for that course of conduct to be put an end to was shortly thereafter (*see* paras 23 and 24).

(b) The owners had positively promoted the Florida proceedings as the appropriate forum. They had secured relief from the Marshall Islands court on the basis that Florida was the jurisdiction in which the dispute could most conveniently be resolved on its merits. The Florida proceedings had been progressed by the owners in a way which, although they had not waived their rights to take jurisdiction points, envisaged that jurisdiction points would not be dealt with separately from and in advance of the merits. There had been no motion to stay or dismiss the Florida proceedings on the grounds of lack of jurisdiction. On the contrary, agreement had been reached for the purposes of progressing those proceedings to a substantive trial on the merits with the resultant expenditure on both sides. In those circumstances, it would be inequitable to prevent the continued pursuit of the Florida proceedings which was the forum in which both the owners and Sagaan had been envisaging for the last eight months that the substantive dispute would be resolved (*see* para 25).

Per curiam: on any ex parte application, and in particular on an ex parte application for relief comprising an anti-suit injunction, it was incumbent upon a party who had not given any or any sufficient notice to be in a position to persuade the judge on the ex parte application of the appropriateness of that course, specifically by reference to the risk of irretrievable prejudice if the normal course was not taken under which the other party was entitled to be heard.

The following cases were referred to in the judgment:

Deutsche Bank AG v Highland Crusader Offshore Partners LLP (CA) [2009] EWCA Civ 725; [2009] 2 Lloyd's Rep 617; [2010] 1 WLR 1023;

Donohue v Armco Inc (HL) [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749;

FZ v SZ [2010] EWHC 1630 (Fam); [2011] 1 FLR 64;

Turner v Grovit (HL) [2001] UKHL 65; [2002] 1 WLR 107.

This was the return date of an order made ex parte by Eder J on 27 June 2012 whereby he granted the claimants, the owners and managers of the vessel now known as *MD Gemini*, an anti-suit injunction against the defendant Sagaan Developments Trading Ltd, the supplier of bunkers to the charterers of the vessel.

Ruth Hosking, instructed by Clyde & Co LLP, appeared on behalf of the claimants; Sandra Healy, instructed by Lewis & Co, appeared on behalf of Sagaan.

The further facts are stated in the judgment of Popplewell J.

Friday, 13 July 2012

JUDGMENT

Mr Justice POPPLEWELL:

1. This is the return date of an order made ex parte by Eder J on 27 June 2012, by which he

granted the claimants an anti-suit injunction restraining the defendant from pursuing proceedings in Florida and the Marshall Islands or elsewhere other than in England. In fact, the order erroneously went further and required the defendant to discontinue the Florida and Marshall Islands proceedings pending this return date. It was not intended to do so, and the fact that it did so was not drawn to Eder J's attention. At the outset of this hearing, Miss Hosking, who appears for the claimant, agreed that that aspect of Eder J's order, which is contained in para 4(ii), should, in any event, be set aside.

2. The first claimant is the owner of a passenger vessel now called *MD Gemini*, formerly *Vision Star*. The first claimant is a Bahamian corporation with a place of business in Florida. It is also registered in the Marshall Islands as a foreign maritime-owning entity. The second claimant, to which I refer as ISP, is an organisation which acts as technical managers for the owners. The defendant ("Sagaan") is a company incorporated and registered in the British Virgin Islands, and carries on business as a supplier of bunkers.

3. Under a long-term time charter on the Baltime form dated 26 March 2009, the owners let the vessel to Quail Cruise Ship Management Ltd who traded under the name Happy Cruises. Under clause 4 Happy Cruises, as time charterers, agreed to provide and pay for all fuel oil. Clause 4 was silent as to diesel oil. The charterparty was governed by the maritime law of the United States and provided for New York arbitration.

4. Happy Cruises stemmed two consignments of bunkers for the vessel from Sagaan. The first was a consignment of 350 mt of IFO and 45 mt of MDO which was supplied to the vessel at St Petersburg on 29 August 2011. The second was a supply of 400 mt of IFO and 50 mt of MDO, again at St Petersburg, on 13 September 2011. The price of those bunkers, amounting to US$511,000, has not been paid. On 28 September 2011 Happy Cruises notified Sagaan that it was suspending its operations and that it would be unable to make payment to Sagaan.

5. On or about 21 October 2011 the vessel was redelivered under the charterparty to the owners. By that stage, all bunkers supplied as a result of the sale by Sagaan had been consumed. On 11 November 2011 solicitors acting for Sagaan wrote to the claimant's solicitors claiming that the owners were liable for the price of the bunkers supplied to the vessel. The owner's solicitors responded on 16 November 2011 to the effect that the bunkers had been supplied under a contract with the charterers, Happy Cruises, and that it was the charterers alone who were the party upon whom liability to pay for the bunkers fell.

6. It is common ground that the contract for the supply of the bunkers incorporated Sagaan's standard terms and conditions, May 2000 edition. Those conditions contain a clause 19.1 in the following terms:

> "Governing law: Save that the seller may take such action or actions as it shall in its absolute discretion consider necessary to enforce, safeguard or secure its rights hereunder in any court or tribunal or any state or country, the provisions hereof shall be governed by the law of England and the jurisdiction of the English courts."

7. Proceedings have been commenced in Florida and in the Marshall Islands by which Sagaan has sought to recover the price of the bunkers. By a complaint dated 26 October 2011 Sagaan brought proceedings in the United States District Court for the Southern District of Florida, Miami Division. The claim was brought against the owners and ISP as well as against Happy Cruises. The claim was for the price of the bunkers both as a contractual claim and under various other alleged causes of action. Not long thereafter, on 31 October 2011, Sagaan brought proceedings in the High Court of the Republic of the Marshall Islands. Those proceedings were expressly both in rem against the vessel, asserting a maritime lien, and in personam against the owners, claiming the price of the bunkers. The in rem claim was put forward notwithstanding that the vessel was not and had not been within the jurisdiction.

8. On 12 December 2011 Sagaan issued a motion to stay the Marshall Islands proceedings. The motion was in the form of a motion to dismiss or to stay. The grounds put forward included forum non conveniens. The motion recorded that the dismissal on those grounds was appropriate where there was an adequate alternative forum existing which possessed jurisdiction over the whole case; the alternative forum which was relied upon on was Florida. The motion said in terms that the Southern District of Florida was the more suitable jurisdiction for the lawsuit. [It said: "Plaintiff [ie Sagaan] already chose the other forum and filed there first'; and "Plaintiff [Sagaan] has already chosen Miami as a forum".] The motion therefore sought a stay of the Marshall Islands proceedings on the express grounds, amongst others, that the substantive dispute was more appropriately to be resolved in the Miami proceedings.

9. On 29 December 2011 the owners entered an answer to the complaint in the Miami proceedings. That answer denied that the owners were party to any agreement to supply bunkers by Sagaan, whilst admitting the supply to the vessel. The answer

averred that the bunkers had been stemmed by Happy Cruises who were the sole party liable under the agreement. The answer referred to the fact that, without prejudice to its defences, the transaction was governed by English law and was subject to the jurisdiction of the English courts. The answer sought dismissal of the complaint on its merits. On the same day, ISP filed an answer which was in similar terms and to similar effect.

10. In the meantime, there were further submissions made in relation to the motion to dismiss in the Marshall Islands. On 7 February 2012 the owners filed reply submissions to Sagaan's opposition to the stay/dismissal motions. In their reply submissions, owners said:

> "Plaintiff [Sagaan] chose to sue in the US District Court in Miami first. Again, the US action is the more complete action as it includes Quail, the buyer of the fuel and the party to the contract. The plaintiff's claims asserted in the Marshall Islands action will be fully adjudicated in the US action which is proceeding already."

Those were the grounds which prevailed before the Marshall Islands court. The motion was heard on 10 February 2012. James Plasman, an Associate Justice of the High Court, held that the proceedings would be stayed because:

> "The Florida action addresses the underlying cause of action identified in the present lawsuit. That court will have easier access to proof and such witnesses as may be necessary. That court is an adequate forum to address the plaintiff's claims."

11. The next stage in the Florida proceedings was that the owners and Sagaan, through their legal advisors, communicated with a view to agreeing a timetable for directions through to a trial of the claim on its merits. Agreement was reached in the form of a joint scheduling report submitted to the court on 25 May 2012. That joint scheduling report identified that the parties wished standard discovery to take place in accordance with the local rules of the Southern District of Florida and/or the federal rules of civil procedure. It set out an agreed schedule by which discovery was to be completed by 2 November 2012 with depositions before that time. It contained dates for service of experts' reports and expert depositions. It identified dates and deadlines for joinder of parties, amendment of pleadings and any dispositive motions. It gave a trial estimate and it identified that there were no pending motions.

12. On or about 6 June 2012 Judge Sykes made a scheduling order setting forth a schedule for the progress of the proceedings through to trial. One of those envisaged the appointment of a mediator, who was subsequently appointed on or about 29 June 2012. Two days before that, on 27 June 2012, the owners made their ex parte application to Eder J. The application was made by giving about two hours' notice by email that the application was going to be made. The application which was sought and was granted was for permission to serve out of the jurisdiction and for an anti-suit injunction. Pursuant to undertakings given, there was issued a claim form by which the owners seek first a declaration that the two supplies of bunkers are subject to English law and jurisdiction and that Sagaan is bound to refer any claim against the owners to the English court; secondly, a declaration that the owners are not party to the contract for the supply of the bunkers; and thirdly, a declaration that the owners are not liable to Sagaan for any outstanding sums in respect of the supply of the bunkers. The claim form also claims reimbursement of, or damages in respect of, sums incurred in defending the proceedings in Florida; and it seeks a permanent anti-suit injunction in the form of the interim anti-suit injunction obtained from Eder J.

13. The principles on which anti-suit injunctions are granted have been the subject matter of guidance in a number of cases, particularly in the speech of Lord Hobhouse in *Turner v Grovit* [2002] 1 WLR 107 at paras 22 to 29 and of the helpful summary by Lord Scott in *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425; [2002] 1 All ER 749 where, at para 53, he said:

> "The principles to be applied in order to decide on the one hand whether an exclusive jurisdiction clause should be enforced by an injunction and on the other hand whether the commencement or continuation of foreign proceedings which are not caught by an exclusive jurisdiction clause should be barred by an injunction seem now well settled and have not been the subject of any real disagreement before your Lordships. It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so. Prima facie parties should be held to their contractual bargain: see *The Fehmarn* [1957] 1 Lloyd's Rep 511; [1958] 1 WLR 159; *The Chaparral* [1968] 2 Lloyd's Rep 158; *The El Amria* [1981] 2 Lloyd's Rep 119; *The Sennar (No 2)* [1985] 1 Lloyd's Rep 521; [1985] 1 WLR 490; *The Angelic Grace* [1995] 1 Lloyd's Rep 87. If, on the other hand, there is no contractual bargain standing in the way of the foreign proceedings, 'the ... court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive': per Lord Goff of Chieveley in *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871, at page 896."

14. In cases where no exclusive jurisdiction clause is present, further guidance is contained in the judgment of Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LLP* [2009] 2 Lloyd's Rep 617; [2010] 1 WLR 1023 at para 50:

> " . . . I would summarise the relevant key principles as follows:
>
> (1) Under English law, the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do so.
>
> (2) It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression but where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.
>
> (3) The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that:
>
> (a) England is clearly the more appropriate form ("the natural forum"); and
>
> (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.
>
> (4) If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted for that would be to overlook the important restraining influence of considerations of comity.
>
> (5) An anti-suit injunction always requires caution because, by definition, it involves interference with the process or potential process of a foreign court. An injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity because it merely requires a party to honour his contract. In other cases, the principle of comity requires the court to recognise that in deciding questions of weight to be attached to 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 connections the foreign court with the parties and the subject matter of the dispute, the stronger the argument against intervention.
>
> (6) The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive . . . "

15. The first issue which falls for consideration in this case is whether clause 19.1 of the standard terms and conditions is an exclusive jurisdiction clause. I should observe at the outset that, of course, the owners say they are not party to any agreement. They are therefore not in a position to assert in these proceedings that any proceedings brought are a breach of a bargain which was made with them. However, I am prepared to assume, although the matter was not fully argued before me, that they are entitled to be put in the same position as if they were parties to the contract containing clause 19.1 notwithstanding their averment that they are not a party. It seems to me that that may be so because generally, it would be oppressive and vexatious for a party asserting a contractual right in a foreign jurisdiction under a contract which contains an exclusive jurisdiction clause in favour of England to seek to enforce the rights under that contract without giving effect to the jurisdiction clause which is part and parcel of that contract notwithstanding that the party being sued maintains that it is not a party to that contract.

16. I turn to clause 19.1. I can decide what the effect of clause 19.1 is on this application because it was not suggested on either side that there was any disputed matter of fact forming the known background which it would be necessary to resolve in order to reach a conclusion on what is a straightforward matter of construction. In my view, the critical words are, "enforce its rights hereunder". Miss Hosking, on behalf of the owners, contended that this was an exclusive jurisdiction clause so far as the substantive rights of the parties were concerned and that the first half of the clause was directing itself solely to actions taken by way of interim preservation measures. That seems to me to be an erroneous construction of the clause.

17. The words, "enforce its rights hereunder", are wide words. "rights hereunder" would include the right to be paid under the contract. The wording of the proviso which forms the first half of the clause is not limited to steps taken in relation to the enforcement of judgments or even the enforcement of claims. Prima facie effect should be given to the wide words which the parties have used and to their natural meaning.

18. This construction is reinforced by the fact that the entitlement to enforce its rights hereunder is expressed to be additional to the ability to "safeguard and secure" rights. Given the width of the earlier parts of the clause conferring as they do a right to take any action or actions as a matter of absolute discretion, it is difficult to imagine any proceedings by way of interim preservation measures which would not already be covered by those words in respect of safeguarding and securing rights. The natural inference therefore is that the additional words, "enforcing its rights", must be a reference to the enforcement of substantive contractual rights.

19. Accordingly, my conclusion is that clause 19 does not amount to a clause under which Sagaan have agreed not to take proceedings outside England to enforce the merits of any claim and in particular in order to enforce a claim to be paid the price of the bunkers in question.

20. Miss Hosking advanced an alternative argument that if the clause was not an exclusive jurisdiction clause, nevertheless it would be vexatious or oppressive to allow the Florida proceedings to continue and to allow the Marshall Islands proceedings to continue. She advanced essentially three points. First, she said that there are reasons for this matter being litigated in England and England is, at least, a convenient forum for the resolution of the substantive dispute between the parties. Secondly, she said that Sagaan had sought in the United States proceedings to assert rights arising otherwise than under English law and that this was impermissible by reason of the English law provision in the contract. Thirdly, she said that the actions of Sagaan were oppressive by virtue of their having commenced two sets of parallel proceedings, one in Florida and the other in the Marshall Islands.

21. In my judgment, these factors do not begin to meet the criteria I have set out which are necessary to support an anti-suit injunction in the absence of an exclusive jurisdiction clause. The English court cannot be put forward as anything more than a convenient forum; it is not the natural forum, and Miss Hosking did not suggest that it was. The fact that the Miami court may apply law other than English law is a matter for the Miami court. The District Court of the United States of America is well capable of applying English law if it be the proper law, and of applying appropriate conflicts rules which are in accordance with international principles of comity. Nor is there any oppression in the fact that two sets of proceedings were commenced, not least because, in any event, the Marshall Islands proceedings have now been stayed so that there is only one set of foreign proceedings on foot.

22. The matter goes further than this and there are other good reasons for not granting an anti-suit injunction in any event. Indeed I would have regarded these as being good reasons not to grant an anti-suit injunction even if clause 19.1 were properly to be construed as an exclusive jurisdiction clause.

23. Miss Healy on behalf of Sagaan prays in aid the delay which has taken place in the application for the current relief. There is, in my view, no reason why the application for an anti-suit injunction should not have been made at the end of last year. Miss Hosking submitted that the reason it had occurred at this time was because earlier in June steps had been taken by Sagaan to arrest the vessel in Holland. She said it was because the arrest was in support of inappropriate Florida proceedings that it became apparent that steps needed to be taken for anti-suit relief. However, on any view of clause 19, arrest of the vessel in Holland or elsewhere in order to secure the claim would be something which would be permitted by the clause. It is not therefore the taking of steps by way of interim measures for security which is relevant to whether there should be an anti-suit injunction; the latter directs itself to the forum in which the substantive merits are to be determined.

24. It must have been apparent from the time when the claim was first advanced that Sagaan might seek to take measures to secure its claim in whatever jurisdiction the substantive merits fell to be decided. By October of last year, it was apparent that Sagaan was pursuing its claim on the merits in the Marshall Islands and in Florida. The time to make an application to this court for that course of conduct to be put an end to was shortly thereafter.

25. But the matter goes rather further than merely one of delay. The history of the proceedings which I have recounted illustrates that the owners positively promoted the Florida proceedings as the appropriate forum. The owners secured relief from the court in the Marshall Islands on the basis that Florida was the jurisdiction in which the dispute would be resolved on its merits and the jurisdiction in which it could most conveniently be resolved on its merits. The Florida proceedings have been progressed by the owners in a way which, although they have not waived their rights to take jurisdiction points, envisages that jurisdiction points will not be dealt with separately from and in advance of the merits. There has been no motion to stay or dismiss the Florida proceedings on the grounds of lack of jurisdiction. On the contrary, agreement has been reached for the purposes of progressing those proceedings to a substantive trial on the merits with the resultant expenditure on both sides. In those circumstances, it would be inequitable to prevent the

continued pursuit of the Florida proceedings which is the forum in which both the owners and Sagaan have been envisaging for the last eight months that the substantive dispute would be resolved.

26. For all those reasons, there will be no further continuation of the anti-suit injunction.

27. I should record that Miss Healy also sought to resist a continuation of the order on the grounds that there had been non-disclosure to Eder J of the obvious argument that clause 19 was not an exclusive jurisdiction clause. It appears from a note of the hearing that although that argument was not specifically adverted to, so that the matter was argued out before him, clause 19 was referred to as being an exclusive jurisdiction clause and Eder J had in mind the wording of the first half of the clause because he expressed concerns as to whether it was sufficient to cover on any view the in rem and maritime lien aspect of the proceedings in the Marshall Islands. In the event, I do not find it necessary to reach any conclusion on the non-disclosure argument and it would not have persuaded me to refuse a continuation of the injunction had I otherwise thought that it would have been appropriate to grant it.

28. Finally and by way of postscript, I would wish to say something about the fact that the application was made on only two hours' notice and therefore effectively ex parte to Eder J. I would like to associate myself with the remarks made by Mostyn J in *FZ v SZ* [2011] 1 FLR 64 at para 32 where he said:

> "It is worth my expressing the view that in the short time that I have been sitting as a full-time judge I have been shocked at the volume of spurious ex parte applications that are made in the urgent applications list. It is an absolutely elementary tenet of English law that save in an emergency a court should hear both sides before giving a ruling. The only recognised exception to this rule (apart from those instances where an ex parte procedure is specifically authorised by statute) is where there is a well-founded belief that the giving of notice would lead to irretrievable prejudice being caused to the applicant for relief. I have the distinct impression that a sort of lazy laissez-faire practice or syndrome has grown up which says that provided that the return date is soon, and provided that the court is satisfied that no material prejudice will be caused to the Respondent, then there is no harm in making the order ex parte. In my opinion this is absolutely wrong and turns principle on its head."

29. I too in the short time that I have been sitting as a full-time judge have been surprised at the volume of spurious ex parte applications that are made. The justification which was advanced to me by Miss Hosking on instructions for having proceeded ex parte in this case was that she was instructed that her United States lawyers had had concerns that, had adequate notice been given, steps might have been taken in the United States to "thwart the application". Given the course which the Florida proceedings had taken, this seems to me to be an inadequate explanation. In any event, it is an explanation which ought to have been given to Eder J on the ex parte application and supported by evidence. I would wish to emphasise that on any ex parte application before this court and in particular on an ex parte application for relief comprising an anti-suit injunction, it is incumbent upon a party who has not given any or any sufficient notice to be in a position to persuade the judge on the ex parte application of the appropriateness of that course, specifically by reference to the risk of irretrievable prejudice if the normal course is not taken under which the other party is entitled to be heard.