This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
[2021] EWHC 1215 (Comm)

No. CL-2020-000663

Royal Courts of Justice
Strand
London, WC2A 2LL

Monday, 26 April 2021

Before:

HIS HONOUR JUDGE PELLING QC

Sitting as a Judge of the High Court

B E T W E E N :

ENEMALTA PLC	Claimant
- and -	
THE STANDARD CLUB ASIA LIMITED	Defendant

MR P MACDONALD EGGERS QC (instructed by DAC Beachcroft) appeared on behalf of the Claimant.

MR N JACOBS QC (instructed by HFW LLP) appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft Teams)

JUDGE PELLING:

1 This is the hearing of an application by the defendant for an order that this court has no jurisdiction to hear this claim or should decline to do so, and for an order setting aside or staying these proceedings in favour of the courts of Singapore.

2 The relevant background facts are set out in summary in the claim form, the relevant parts of which are in these terms:

> "1. On 23 December 2019 Malta suffered a nationwide power outage found to be caused by damage to the Claimant's underwater High Voltage Alternating Current (HVAC) connector cable in the Sicily Channel (the 'Incident'). The Claimant believes that the said damage was caused by the M/V DI MATTEO (the 'Vessel'), whose registered owners are Roberto PTE Ltd (the 'Owners'), a company domiciled in Singapore. The Vessel was entered with the Defendant P&I Club ('the Club').
>
> 2. On 3 January 2020, the Club provided security to the Claimant by way of a Letter of Undertaking ('the LoU') under reference EB/19/270282/01 for a value equivalent to the maximum tonnage-related limitation figure prescribed under the 1996 Protocol to the Convention on Limitation for Marine Claims 1976 ('the 1996 Protocol'). The LoU is expressly subject to English law and to the exclusive jurisdiction of the English High Court of Justice.
>
> 3. Proceedings are currently in progress in the First Hall of the Civil Court of Malta … by which the Claimant seeks damages from Owners in respect of the Incident. Malta is a jurisdiction in which the 1996 Protocol applies.
>
> 4. The Owners have commenced proceedings in the High Court of Singapore … wherein they seek to establish a limitation fund for the purposes of limiting their liability in respect of the Incident to a lower value calculable by reference to the Convention on Limitation for Marine Claims 1976. In those proceedings Owners have invited the court to order, amongst other things, that upon the establishment of the said fund any existing security given by or on behalf of Owners shall be released forthwith. To the Claimant's knowledge, the only such security in existence is the LoU.
>
> 5. The order sought by Owners in the Singapore Court attempts to invade this Court's exclusive jurisdiction with respect to the LoU. Accordingly, the Claimant requests the following declarations from this Court:
>
> i) All and any disputes arising over the validity of the Letter of Undertaking issued on 3 January 2020 under reference EB/19/270282/01 by the Standard Club Asia Limited to Enemalta Plc ('the LoU') are to be determined solely in the High Court of Justice, in proceedings between the said parties in England applying English law.

> ii) The LoU is and remains a valid and binding contract between Enemalta Plc and the Standard Club Asia Limited ('the Club'), and is not null and void.
>
> iii) Should the Club by itself, its agents or privies (including any action brought by its ship owning member or members at its behest), wish to dispute the continuing validity of the LoU, it must do so solely by bringing proceedings in this Court, and any contrary proceedings brought by or at the behest of the Club would constitute a breach of the LoU.
>
> iv) Should any contrary declaration to paragraph (ii) above be made by the Singapore Court in the proceedings known as Case No. HC/ADM 6/2020 between Roberto 16 PTE Ltd and Ishima PTE Ltd and Enemalta Plc, pursuant to the Application dated 8 May 2020, and amended thereafter, it will not affect the validity of the LoU under English law, which is and remains the applicable law of the LoU."

3 Five points arise out of this otherwise accurate summary of the relevant facts. First, strictly, it is not correct to say that the security provided by the letter of undertaking was equivalent to the maximum sum provided for by the 1996 Convention since the security provided was inclusive of interest and costs. Secondly, this is not a case where the letter of undertaking was provided to secure the release of the vessel from arrest. It was negotiated and provided before any attempt at arrest had been made. Thirdly, the alleged incident did not take place in the port or in the territorial waters of any nation but occurred in international waters. Fourthly, the defendant is a company registered in accordance with the laws of and operates from the Republic of Singapore. Finally, although it may be obvious, the reason why these proceedings matter is because the limit of liability under the letter of undertaking is fixed at a sum of in excess of €21 million, whereas the maximum sum that will be secured by an order under the 1976 Convention is €5.77 million.

4 Returning to this application, the basis on which the defendant, who I emphasise is not the owner of the vessel but its P&I insurer, apparently challenges jurisdiction is on the bases set out in its application notice, that is:

> "(1) The Singapore Court has sole and exclusive jurisdiction to make an Order under Article 13(2). England does not have jurisdiction to determine the relief sought raised in the claim form because the Singaporean Court is not seeking to 'invade this Court's exclusive jurisdiction with respect to the LoU.' (See paragraph 5 of the Claim Form); alternatively,
>
> (2) the Singaporean Court is the proper and more convenient forum for determining whether an Order should be made under Article 13(2) as it is the forum in control of the limitation proceedings."

Although it is said in the application notice that Singapore is the proper and more appropriate forum for determining whether an order is made under Article 13.2 of the 1976 Convention, that rather misses the point, which is whether any order made by the Singapore Court to the effect that the letter of undertaking be released would affect the validity of the letter of undertaking, the subject of these proceedings, by operation of its governing law, which is English law. As I set out below, the letter of undertaking contains an exclusive English Court jurisdiction clause. In any event, these proceedings were commenced on 9

October 2020, prior to the UK's exit from the European Union. In those circumstances, Article 25 of Regulation EU number 1215 of 2012 ("Brussels Recast") applies, with the consequence that the court has no jurisdiction to refuse jurisdiction or stay proceedings otherwise within the scope of the jurisdiction agreement on *forum non conveniens* grounds - see *IMS SA v Capital Oil and Gas Industries Limited* [2016] EWHC 1956 Comm, [2016] 4 WLR 163 *per* Popplewell J at para.44. Thus the sole basis on which the jurisdiction of the English Court can be challenged in these proceedings is on the basis that the Singapore Court has the sole and exclusive jurisdiction to make an order under Article 13.2 of the 1976 Convention.

5 The letter of undertaking is in these terms:

> "In consideration of your refraining from arresting and/or interfering in any other way with the use or trading of the above ship or any other ship or property or asset in the same or associated ownership or management, we, The Standard Club Asia Limited, hereby agree to pay to you such sum or sums as may be judged without the right of appeal by a competent court or arbitration tribunal (and you are to keep the Club duly informed of all existing and future legal proceedings against the ship and/or the owners of the above ship) or agreed between the parties with our consent to be due to you from the ship and/or the owners and/or the bare boat charterers of the above ship in respect of the above matter, provided always that our total liability hereunder shall not exceed the sum of Euro 21,569,736.19… inclusive of interest and costs. This undertaking is given without prejudice to any rights or defences of the owners of the above ship, including their right to limit liability.
>
> This letter of undertaking shall be governed by and construed in accordance with English law and any dispute arising thereunder shall be subject to the exclusive jurisdiction of the High Court of Justice in London…"

6 Article 13.2 of the 1976 Convention is to the following effect:

> "After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State…"

7 The effect of Article 13.2 as a matter of English law has been considered in only one authority to which my attention has been drawn - *The ICL Vikraman* [2003] EWHC 2320 Comm, [2004] 1 Lloyd's Rep 21, a decision of Colman J. That case was in some ways the mirror image of this case. There, an English domiciled P&I club provided a letter of undertaking to cargo interests in Singapore to obtain the release of a vessel arrested there. That letter of undertaking, which contained no tonnage limitation provision, included a non-exclusive English jurisdiction agreement. At the relevant time, the UK was a state party to the 1976 Convention but Singapore was not. The vessel's owner established a limitation fund in England in accordance with the 1976 Convention and applied for the release of the letter of undertaking, pursuant to Article 13.2 of the 1976 Convention.

8 Colman J dismissed that application. In summary, he held that the overriding purpose of the 1976 Convention was to cap a ship owner's liability for a particular incident, and for the enforcement of that liability against a single source of security but that its scope was confined to state parties, both in relation to the establishment of a limitation fund and in relation to the release of other security which, if it was to be released, had to be within the jurisdiction of the state party concerned or at least a state party to the 1976 Convention. The purpose of Article 13.2 was to protect a ship owner, who had established a limitation fund in any state that was a state party to the 1976 Convention in respect of a claim, from enforcement of that claim against any other property or security that was subject to the jurisdiction of the same or another state party. It followed that although the owner was entitled to establish the limitation fund in England, the effect of Article 13.2 was that security located in Singapore did not fall within that article because Singapore was not a state party to the 1976 Convention and so that security would not be, or could not be, released. As Colman J put it in para.69 of his judgment:

> "I am quite unable to accept the submission on behalf of ICL that 'such State' at the end of the first sentence of Article 13.2 is capable of referring to the state where the limitation fund has been constituted regardless of the jurisdiction in which the vessel has been arrested or within which the security has been put up. Such construction is inconsistent with the words used, for such state must refer back to the State Party in whose jurisdiction the attempt has been made to create additional security. Further, the Convention cannot be construed so as to create a power in the courts of one State Party to interfere by order with the disposition of property or other security within the jurisdiction of a state that is not a party. The security regime provided by the Convention is clearly confined to States that are party to it."

9 Whether that authority will be followed as a matter of Singapore law is not for me to say, although generally state courts attempt to adopt a common interpretation of cross-border conventions. However, what is clear is that it is highly likely that *The ICL Vikraman* will be followed by an English court in deciding whether an order made by the courts of a state party to the 1976 Convention can have the effect of releasing a security that is not subject to either the laws or jurisdiction of that or any other state party to the 1976 Convention.

10 As a matter of English law, it is better than seriously arguable that the letter of undertaking is not a security within the jurisdiction of the Singapore Court. It is not a vessel or other property attached within the jurisdiction of any state party to the 1976 Convention, nor was the security given to obtain the release of a vessel or other property attached within the jurisdiction of any state party to the 1976 Convention. Physically, the letter of undertaking is located in Malta, which is not a state party to the 1976 Convention to the extent that physical location is relevant, as to which see *The ICL Vickerman* (ibid.) *per* Colman J at para.70.

11 In addition, it is probable that English law would treat the letter of undertaking as being located in England because that is the state that, by agreement between the parties, has been given exclusive jurisdiction in relation to it – see *SAS Institute Inc v World Programming Limited* [2020] EWCA Civ 599, per Males LJ, at paras.59 and 61, approving the statement of general principle in *Hardy Exploration v the Government of India* [2018] EWHC 1916 Comm, [2019] QB 544 at para.82. Whilst this differs from the conclusion reached by

Colman J in *The ICL Vickerman* (ibid.), no authorities were drawn to his attention that addressed this issue.

12 In summary, therefore, it is at least strongly arguable that an English court applying English law would conclude that the letter of undertaking should be treated as located in England and that, in consequence, the Singapore Court has no jurisdiction to order its release, if that is what ultimately happens, because the letter of undertaking is not a security that is within the jurisdiction of a state party to the 1976 Convention.

13 I now refer to the defendant's application. The defendant's case is that it is for the Singapore Court to decide whether it has jurisdiction under Article 13.2 to order the release of a letter of undertaking. The defendant fully accepts that the Singapore Court may determine that Singapore is not the relevant state party for the purpose of releasing the letter of undertaking, but maintains that it is only that court that can decide that issue, because the question of whether the Singapore Court has jurisdiction under Article 13.2 is not a dispute arising under the letter of undertaking but is one that arises under the 1976 Convention which is exclusively within the jurisdiction of the Singapore Court.

14 The claimant maintains that this is all wrong and should be rejected because:

(a) the parties to the letter of undertaking have agreed that the English Court is the exclusive forum for dealing with all disputes that arise under the letter of undertaking; and/or

(b) Article 13.2 of the 1976 Convention is inapplicable to the letter of Undertaking because (a) the UK is not a party to the 1976 Convention, (b) no limitation fund has yet been established in Singapore, (c) the Singapore Courts have no power under Article 13.2 to make an order in relation to the letter of undertaking, and (d) the letter of undertaking is not located within the jurisdiction of the Singapore Court.

15 In determining these issues, I make clear at the outset that nothing I say in this judgment should be treated as being or is intended to be in any way an indication as to how the Singapore Court should approach the issue that is before it. That is a matter exclusively for the Singapore Court to resolve, applying Singapore law. My sole concern on this application is whether the English Court has jurisdiction to determine the claimant's application for the declarations it seeks.

16 If the Singapore Court decides it has no jurisdiction to order the release of the letter of the undertaking, then no problem arises. However, if the Singapore Court accedes to the owner's application, and if the claimant succeeds in recovering a judgment in the Maltese proceedings for a sum in excess of the security that would be provided under the 1976 Convention in Singapore, the claimant would seek to enforce its claim in England against the defendant under the letter of undertaking. Any such proceedings would have to be brought in England because the parties have agreed that the English courts have exclusive jurisdiction to determine disputes under the letter of undertaking, and would be determined in accordance with English law because the parties have agreed that will be the law governing the contract contained in or evidenced by the letter of undertaking.

17 The question whether any order of the Singapore Court under Article 13.2 of the 1976 Convention had the effect of releasing the defendant from its letter of undertaking would be a dispute to be determined in England according to English law. If the English Court would

have jurisdiction in such circumstances, there is no principled reason why the court would not have jurisdiction to determine by declaration a dispute between the defendant which maintains that any order made by the Singapore Court under Article 13.2 would have the effect of discharging the letter of undertaking, and the claimant, which maintains that that cannot be the effect of such an order, applying English law. There is further no principled reason why the English Court would not have exclusive jurisdiction in relation to such a dispute, just as it would over an enforcement claim, following judgment in the Maltese proceedings. This is so because the exclusive jurisdiction agreement governs all disputes between the parties concerning the letter of undertaking. Such a provision means that the parties are to be taken to have agreed on a single tribunal resolving all disputes arising under their contract - see *Fiona Trust & Holding Corporation v Primalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254, *per* Lord Hope at para.26.

18 In those circumstances, I accept Mr MacDonald Eggers QC's submission that the English Court should not decline jurisdiction to hear a claim by a party seeking a declaration as to its rights under a contract subject to the English Court's exclusive jurisdiction in deference to a decision that may be made by a court in another jurisdiction under a convention to which the UK is not a party. The application by the owner in Singapore under Article 13.2 is wholly separate from the claimant's claim against the defendant who is, as I have said, not a party to the Singapore proceedings, in those proceedings. The issue concerning the effect of any order by the Singapore Court on the enforceability of the letter of undertaking is one that by agreement between the parties is one that must be determined exclusively by the English court.

19 The defendant maintains that these proceedings are for the purpose of obtaining an order that the owners are not entitled to apply to the Singapore Court for the release of the letter of undertaking. I do not accept that to be so for the following reasons. The owner is not a party to these proceedings. The letter of undertaking is an autonomous contract between the claimant and the defendant and these proceedings are concerned with a dispute as to the effect on that contract of an order being sought in Singapore, from the Singapore Court, under the 1976 Convention in proceedings brought by the owner. These proceedings in no way impinge upon the ability of the owner to make its application to the Singapore Court or the undoubted right of the Singapore Court to make whatever order it considers appropriate in those proceedings. These proceedings are concerned with the entirely separate question of the impact, if any, that an order sought in Singapore will have on the liability of the defendant under its autonomous contract with the claimant contained in the letter of undertaking. That issue is one that the parties to that agreement have agreed should be determined exclusively by the English Court.

20 Returning now to the application before me, it is not in dispute that the Singapore Court has exclusive jurisdiction to make an order under Article 13.2 of the 1976 Convention. Rather, these proceedings are concerned with the dispute between the claimant and the defendant as to the effect of any order made in the Singapore proceedings, commenced by or in the name of the vessel's owner, on the liability of the defendant under its autonomous contract with the claimant. That is an issue that the parties have agreed should be determined exclusively by the English Court and it is on that question that the declarations sought in these proceedings are focused. In summary, the question for the Singapore Court is whether and, if so, to what extent it should order the release of other security upon the constitution of a limitation fund in accordance with Article 11 of the 1976 Convention. The question for the English Court is whether and, if so, to what extent, any such order would have the effect of releasing the letter of undertaking – an issue, as I have said, that is exclusively for the English courts to determine.

21 In those circumstances, the defendant's application fails.

22 All that said, there is a case management issue which arises, which concerns whether an order ought to be made which stays these proceedings pending determination of the issue that it is for the Singapore Court to decide. I will hear counsel further on that issue following the completion of this judgment. In the result, therefore, the application fails and is dismissed.

LATER

23 The issue I have to determine now is a very short case management question arising out of the judgment I delivered a moment ago. As I endeavoured to explain in the course of the judgment, it will be for the court in Singapore to decide what orders it proposes to make under the 1976 Convention, and in particular Article 13.2 thereof. Unless and until that court has decided what orders it is going to make, the relief which is sought by way of declaration in these proceedings is to a large extent academic because the court in Singapore may take the same view as does the English Court in relation to the scope and effect of Article 13.2, following the case law to which I referred in the substantive judgment. If it does take that view, then the consequence would be that these proceedings would be, as Mr Jacobs put it accurately, moot.

24 Further, Mr Jacobs says that there will be, or could be, findings in Singapore which are material to the approach that an English court will adopt to the declaration sought. I can see that that might be a possibility, but above all there is always a hesitation on the part of English courts to allow purely academic issues to be resolved, at any rate unless all parties agree. There is some case law in relation to declarations which suggests that academic issues can be resolved where all parties are agreed that it is in everyone's interests to do so, but the parties are not agreed in the circumstances of this case that that is the appropriate course.

25 In those circumstances, what I propose to do is to impose a case management stay but with liberty to either party to apply to lift the stay on seven days' notice to the other parties.

LATER

26 The issue which now arises concerns the summary assessment of the successful claimant's costs. The headline sum sought is £97,599 because VAT is not chargeable and therefore comes out of the total amount. I remind myself at the outset that the test I have to apply is to ask whether the work that has been done for which payment is claimed is reasonable and proportionate and, to the extent it is not, to exclude it, and in relation to the work which is reasonably and proportionately done, I have to arrive at a figure which is reasonable and proportionate in amount for that work.

27 The overarching point made by Mr Jacobs on behalf of the defendant is that prior to the hearing, a schedule of costs was lodged by the claimant which claimed a total sum prior to the inclusion of VAT of some £72,900-odd, and therefore the sums which are being claimed have increased from about £73,000 to the grand total sought in this case of £97,000, an increase of about £25,000.

28 The explanation for these figures seemed to come down to, first of all, a charge by counsel for attending this hearing of £4,000, and, more particularly, an increase in the sums for work on documents. The principal sum on work on documents is at item 5 where, in relation to the cost of preparing for the application hearing, as summarised in that row, work is claimed at the level of 12.6 hours for the grade A fee earner, 60.5 hours for the grade B fee earner, and half an hour for the grade C fee earner. In the original schedule filed, the same item included only 6.3 hours for the grade A fee earner, 34.5 hours for the grade B fee earner and half an hour for the grade C fee earner. The explanation offered by Mr MacDonald Eggers on instructions is that this difference is represented by an erroneous undercharging in the original schedule.

29 The effect of that submission is to force attention on the question of whether or not it is reasonable and proportionate to spend a total of nearly seventy-four hours on preparing for the application hearing, obtaining details of the parties and considering all documents for the application, reviewing and preparing the bundle for application hearing and considering the skeleton arguments for both parties, and in my judgment it is manifest that that is in excess of what is reasonable and proportionate. For my part, I conclude that whilst high, the levels of charging identified in the original bill much more accurately reflect what is reasonable and proportionate, and therefore I assess item 5 and the work on documents in the sum of £13,977.

30 The other issue which arises concerns settling instructions to counsel, for which 11.6 hours is claimed. In my judgment, this is in excess of what is reasonable and proportionate, having regard to the fact that counsel had been instructed to review some instructions, carry out some research on jurisdiction and prepare an email advice on jurisdiction, and thus can be fairly taken to be familiar with at least the outline issues that arise. In those circumstances, a much more skeletal set of instructions would be appropriate. Allowing for the fact that the preparation of instructions to counsel will include the preparation of papers for inclusion with the instructions, it is nonetheless in excess of what is reasonable and proportionate to charge eleven and a half hours for that exercise, and particularly 1.6 hours for a grade A fee earner. I would reduce the sums which are recoverable by the grade A fee earner for instructions to counsel to 0.5 and I would reduce the sum which is recoverable by the grade B fee earner to five hours.

31 The other item that remains is the fee charged by counsel for attending this hearing. Both counsels received substantial remuneration for the hearing of the application. The hearing today has been focused on the delivery of a relatively short judgment, consideration of a relatively straightforward case management hearing, together with the conventional issues that arise. I accept Mr Jacobs' submissions that in the circumstances that should be rolled up into the brief fee and I therefore deduct that sum. Other than in respect of those adjustments, I assess the sums due as asked because there was no opposition to any of the other items.

LATER

32 This is an application for permission to appeal. Two grounds are identified. The overarching one is that this case raises the inter-relationship between limitation proceedings in one jurisdiction and the effects of an exclusive jurisdiction clause in relation to a security provided in the form of a letter of undertaking containing an exclusive jurisdiction clause which provides for determination of all disputes in another jurisdiction that is not party to relevant limitation convention.

33 It is submitted on behalf of the defendant by Mr Jacobs that this issue is one which is of importance to the maritime community generally and therefore it is an appropriate one for permission to appeal to be given. So far as that is concerned, I conclude, first of all, that there is no realistic prospect of the Court of Appeal coming to a different conclusion to that which I have arrived at, but, so far as importance is concerned, the issues are much more naturally issues which arise following a substantive determination of the issues that arise. The sole concern of this application was whether the English Court had jurisdiction to entertain applications for the declarations that were sought. In my judgment, it is plain that the English Court has jurisdiction for the reasons that I identified in the judgment. Therefore, the issue which Mr Jacobs alludes to, whilst one of potential general importance, is one which arises only once the substantive issues are resolved.

34 It is said that my judgment is inconsistent with that which Colman J arrived at in the decision I referred to in the judgment because of his conclusion concerning the effect of the jurisdiction clause in that case. There is no real prospect of the court of appeal coming to a different conclusion from mine on this issue. First, it is immaterial to the outcome of this case because there is no basis on which it can be said that the letter of undertaking comes within the jurisdiction of Singapore even if Colman J was right and I am wrong on the effect of the jurisdiction clause. Secondly, however, there is no real prospect that the Court of Appeal will conclude that Colman J was correct and I am wrong because of the effect of the authority cited in my judgment. Overall, I do not consider that there is any realistic prospect of the Court of Appeal coming to a different conclusion by reference to this point either and, in those circumstances, I refuse permission to appeal.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.