In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2021: No. 65

BETWEEN:

PRINCESS CRUISE LINES LTD.

Plaintiff

- and -

TOMISLAV RADONJIC

Defendant

RULING

Ex Parte Summons – Employment Contract - Bermuda Arbitration and Choice of Law – California Proceedings – Anti-Suit Injunction - Preventing Anti-suit and/or Anti-anti-suit Injunction – Leave to Serve out of the Jurisdiction

Date of Hearing: **19 March 2021**
Date of Ruling: **12 April 2021**

Appearances: **Shannon Dyer, Walkers (Bermuda) Limited for the Plaintiff *ex parte***

RULING of Mussenden J

Introduction

1. This matter came before me on the Plaintiff's ("**PCL**") *ex parte* application (a) for an interlocutory injunction to restrain the Defendant ("**Radonjic**") from proceeding with an action in the United States, in the state of California or in any other court or tribunal and (b) related relief for leave to issue and serve these proceedings including the Plaintiff's Originating Summons out of the jurisdiction. The basis of the application is that the USA Proceeding is in breach of the arbitration clause in an employment agreement between them. The applications are supported by the First Affidavit of Dana L. Berger, Director of Claims Management of the Plaintiff sworn on 26 February 2021 together with its Exhibit DLB-1, her Second Affidavit sworn on 16 March 2021 together with its Exhibit DLB-2 and her Third Affidavit sworn on 18 March 2021 together with its Exhibit DLB-3. After hearing full argument from Mr. Dyer for the Plaintiff, I granted the applications and promised reasons which I now give.

2. The Plaintiff PCL is a Bermuda exempted company incorporated in Bermuda with its registered office in Hamilton, Bermuda.

3. The Defendant Radonjic entered into an employment agreement ("**the Employment Agreement**") with PCL to occupy the role of 2nd Electrical Officer on board the *Emerald Princess* cruise ship from 8 January 2019 to 11 April 2019.

4. The Employment Agreement incorporated Officers Terms and Conditions of Employment, which include a requirement to arbitrate disputes at Article 14 in accordance with the Arbitration Act of 1986 of Bermuda ("**the Arbitration Act**"). Article 14.1 set out specific requirements for an arbitrator, including that the arbitrator must be a licensed attorney in Bermuda or the United Kingdom with at least 10 years' experience practicing law.

5. The material parts of the Employment Agreement in respect of arbitration in Bermuda was set out as follows:

"Article 14 Arbitration. Any and all disputes between Officer, including any claim arising out of, or in any way related to, this Agreement or the employment or termination of employment of the Officer, including but not limited to, any claims of wrongful discharge, harassment and/or discrimination, pay issues, etc. are international commercial disputes and shall be brought by Officer as an individual and not as part of a class and referred to and resolved exclusively by binding arbitration in Bermuda pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York 1958), 21 U.S.T. 2517, 330 U.N.T.S. 3, 1970 U.S.T Lexis 115 ("the Convention"), to the exclusion of any other fora, in accordance with the Arbitration Act 1986 of Bermuda ("Arbitration Act"). The parties insist upon Arbitration because of, among other things, is relative speed and cost effectiveness."

6. Article 14 also set out specific rules for the selection of an arbitrator as follows:

"14.1 The parties hereby stipulate to have their disputes resolved by a single arbitrator, who must be either a licensed attorney, solicitor or barrister in Bermuda or the United Kingdom with at least 10 years' experience practicing law and experience in Bermuda, or a former judge in Bermuda or the United Kingdom.

14.2 The parties intend that this provision be valid, irrevocable, and construed as broad as possible and agree that any dispute regarding the arbitrability of any claim or action between the parties will be resolved by the arbitrator. All decisions of the arbitrator shall be final and binding on all parties.

14.3 The parties agree that the award of the arbitrator shall be enforced in other courts."

Background to Mediation Efforts and to the Arbitration Notice

7. According to Ms. Berger, the Defendant took up employment on the *Emerald Princess* pursuant to the Employment Agreement. On 2 April 2019, prior to the end of the employment term, the Defendant disembarked from the *Emerald Princess* for medical reasons.

8. On 14 April 2020, PCL received a Notice of Arbitration from counsel representing Radonjic ("**the Arbitration Notice**"). By way of the Arbitration Notice, Radonjic claimed that he had suffered an injury on 29 March 2019 in the course of his employment and made various allegations as to the cause and his resulting claims against PCL. The Arbitration Notice also contained the following statement:

   *"The Claimant proposes the Arbitrator be selected from the Arbitrators Register of the Chartered Institute of Arbitrators Bermuda Branch. ("**CIABB**")*

   The foregoing is made without prejudice and Mr. Radonjic has not waived any substantive statutory or general maritime law rights by agreeing to submit to arbitration."

9. Thereafter, the parties engaged in correspondence regarding potential mediation in October and November 2020 and the selection of an arbitrator as follows:
   a. On 21 September 2020, PCL's proposed list of 5 arbitrators of the CIABB was rejected by Radonjic. Radonjic's proposed list of 5 attorneys licensed in Florida was rejected by PCL as they did not met the requirements of Article 14.1 of the Employment Agreement.
   b. On 22 September 2020, counsel for Radonjic indicated they wished to work toward the mutually agreeable goal of sitting down for fair mediation. They added that if mediation did not resolve the matter then they revisit arbitrator selection.
   c. On 19 October 2020, the parties agreed to reschedule mediation for sometime in early 2021.

d. On 12 November 2020, counsel for Radonjic proposed His Honour Jeffrey Burke QC of the United Kingdom as arbitrator in breach of the agreement to mediate.
e. On 7 December 2020, counsel for Radonjic wrote to Mr. Burke and indicated that he had been chosen as PCL did not respond within 21 days to the Defendant's proposal. Immediately, PCL's counsel responded indicating that Mr. Burke did not meet the requirements of the Employment Agreement as he did not have experience practicing law in Bermuda.
f. On 17 February 2021, counsel for Radonjic indicated that no settlement was reached at mediation and that the parties would proceed to arbitration, reiterating its position that Mr. Burke would serve as arbitrator.

10. By Originating Summons issued 10 March 2021, the Plaintiff sought an order of this Court appointing a sole arbitrator pursuant to section 15(1)(a) of the Arbitration Act.

The California Proceeding

11. According to Ms. Berger, on 11 March 2021, the Defendant filed a complaint against PCL in the United States District Court Central District of California ("**the California Proceeding**"). She states that those proceedings address identical grounds as those for which Radonjic issued the Arbitration Notice and she submitted essentially the same exhibits in the California Proceeding as those exhibited in her Exhibits in these proceedings, including certain email exchanges between the Plaintiff's and Defendant's counsel. Also, he states that Radonjic excluded all correspondence regarding the appointment of an arbitrator and the parties' inability to agree.

The Legal Principles for an Anti-Suit Injunction

12. I issued a judgment dated 3 March 2021 in the case of *Allied World Assurance Company Ltd v Bloomin' Brands, Inc*[1] wherein I set out the applicable legal principles applicable in Bermuda to anti-suit injunctions. I now repeat some of those legal principles.

[1] [2021] SC (Bda) 16 Civ

13. The Court has jurisdiction to grant an anti-suit injunction pursuant to its inherent jurisdiction, and/or section 19(c) of the Supreme Court Act 1905, and/or section 35(5)(e) of the Bermuda Conciliation and Arbitration Act 1993, and/or RSC Order 29.

14. The general powers of the Court to grant an interlocutory injunction are stated in section 19(c) of the Supreme Court Act 1905.

> "*…an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to* be just or convenient that *such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just*…"

15. In *Apex Fund Services Ltd and Peter Hughes v Matthew Clingerman (as Receiver) and Silk Road Funds Limited* [2019] SC (Bda) 74 Com Subair Williams J relied on extensive passages from some of those cases in setting out the legal principles in respect of applications for anti-suit injunctions. Subair Williams J stated:

> *"115. Applying the approach of Millett, LJ in* The Angelic Grace *[1995] 1 Lloyd's Rep 87 at 96, as approved by Stuart-Smith JA of the Bermuda Court of Appeal* in *IPOC*[2] *: If the Plaintiffs could establish a contractual right under the Administration Agreement to an anti-suit injunction, then there would be no good reason for diffidence in granting an injunction to restrain the New York proceedings."*

16. In the recent case of *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm), Cockerill J stated:

> *"38. As to the general principles governing anti-suit relief, the following statements were essentially common ground:*

[2] IPOC International Growth Fund Ltd v OAO "CT-Mobile" [2007] Bda LR 43

i) The Court has the power to grant an interim injunction "in all cases in which it appears to the court to be just and convenient to do so": section37 (1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).

ii) The touchstone is what the ends of justice require: Emmott v Michael Wilson & Partners Ltd [2018] 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.

iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013] 1 WLR 1889 (SC).

iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] UKPC 12, [1987] AC 871, 892E per Lord Goff.

v) As to the meaning of "caution" in this context, it has been described thus in The "Angelic Grace" [1995] 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: "The exercise of caution does not involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection."

vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39]. [emphasis added] *The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003] 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in Ecobank v Tanoh [2016] 1 WLR 2231 at 2250.*

vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief: The Angelic Grace [1995] 1 Lloyd's Rep 87; The Jay Bola [1997] 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.

viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief: Donohue v Armco Inc [2002] 1 All ER 749 at [24]-[25] per Lord Bingham."

17. In respect of the Court exercising its discretion to secure compliance with the contractual bargain, in *Donohue v Armco* [2002] 1 All ER 749 Lord Bingham stated:

"24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it."

18. Also, in respect of the Court protecting the integrity of a contractual bargain reached between the parties, in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm), Jacobs J stated:

"36. … the starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties. This is, in my view, one reason why "strong reasons" are and should be required once the court is satisfied, to a high degree of probability, that there is a valid English jurisdiction clause to which the parties have agreed."

19. In respect of determining what is a 'strong reason' Lord Bingham endorsed the list of matters to be considered given by Brandon J's judgment in *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242:

"The principles established by the authorities can, I think, be summarized as follows: (1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion, the court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4) the following matters, where they arise, may be properly regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether plaintiffs would be prejudiced by having to sue in the foreign Court because they would, (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

20. In *ACE Bermuda Insurance Ltd. v Continental Casualty Company and Continental Insurance Company* [2007] SC (Bda) 12 Com, Ground CJ stated:

> *"8. As to the claim for an injunction, when it comes to enforcing an arbitration clause by anti-suit injunction the courts will act robustly: See The Angelic Grace [1995] 1 Lloyds Rep.*
>
> *9. In order to justify an anti-suit injunction at this stage the test is higher than the balance of convenience. The plaintiff has to show "a prima facie case that it would indeed be unconscionable and unjust" if it were subjected to this action: …"*

21. In *Carnival Corporation and others v Alexio Estibeiro* [2013] Bda LR 20 Kawaley CJ stated:

> *"17. Finally I should explain briefly why I decided to grant the injunction sought. It is really trite law that where a party has contracted to have their disputes resolved in a particular forum or by a particular means such as arbitration, it is regarded as unconscionable for a party to seek relief which falls within the arbitration clause or exclusive jurisdiction clause otherwise than from the contractually agreed tribunal."*

22. In respect of granting an injunction restraining a Defendant from pursuing proceedings in a foreign court, in the case *The Angelic Grace* [1995] 1 Lloyds's Rep 87 Millett LJ stated:

> *"96L. In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution…*
>
> *96R. We should, it was submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the Defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the Plaintiff's application to the Italian Court to stay those proceedings, and*

all on the ground that it can safely be left to the Italian Court to grant the Plaintiff's application. I find that proposition unattractive. It is also somewhat lacking in logic, for if an injunction is granted, it is not granted for fear that the foreign court may wrongly assume jurisdiction despite the Plaintiffs, but on the surer ground that the Defendant promised not to put the Plaintiff to the expense and trouble of applying to that Court at all. Moreover, if there should be any reluctance to grant an injunction out of sensitivity to the feelings of a foreign court, far less offence is likely to be caused if an injunction is granted before that Court has assumed jurisdiction than afterwards, while to refrain from granting it at any stage would deprive the Plaintiff of its contractual rights altogether.

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as ... The justification for the grant of the injunction in either case is that without it the Plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

23. In respect of damages being an inadequate remedy, in *Continental Bank v Aekos* [1994] 1 WLR 588 at 598, Steyn LJ stated at 598:

"In our view the decisive matter is that the bank applied for the injunction to restrain the defendant's clear breach of contract. In the circumstances, a claim for damages for breach of contract would be a relatively ineffective remedy. An injunction is the only effective remedy for the appellants' breach of contract. If the injunction is set aside, the appellants will persist in their breach of contract, and the bank's legal rights as

enshrined in the jurisdiction agreements will prove to be valueless. Given the total absence of special countervailing factors, this is the paradigm case for the grant of an exclusive jurisdiction agreement. In our judgment the continuance of the Greek proceedings amounts to vexatious and oppressive conduct on the part of the defendants. The judge exercised his discretion properly."

Analysis – Applicability of the legal principles

24. The circumstances in this case are remarkably similar to the circumstances in *Allied World Assurance Company Ltd v Bloomin' Brands, Inc* and therefore the Plaintiff's submissions as well as my analysis are similar to those in that case.

25. The Plaintiff submits that this Court has jurisdiction to grant an anti-suit injunction in this matter. Further, the exclusive arbitration clause incorporated into the Employment Agreement at Article 14 is clear in that it addresses the claim of injury arising out of Radonjic's employment by PCL on board the *Emerald Princess* which has been raised in both the Arbitration Notice and the California Proceeding. Additionally, the Court should find support in the fact that the Defendant exhibited the Employment Agreement, containing the arbitration clause, in the California Proceeding and it was the Defendant who served the initial Arbitration Notice in which the Defendant submitted to arbitration and proposed selection of an arbitrator from the CIABB. Therefore, there is no doubt that the arbitration agreement governs this dispute. Therefore, the Court ought to exercise its discretion to grant an anti-suit injunction unless the Defendant can show strong reasons for proceeding in California.

26. I recognize that this is an interlocutory application and that I have only heard one side. However, in light of the circumstances of the Employment Agreement with the arbitration notice, I am of the view that it is appropriate to grant the application for an anti-suit injunction for several reasons.

27. First, the initial important question is whether the Plaintiff has established, to a high degree of probability, that there is an arbitration agreement which governs the dispute in question. Upon a review of the Employment Agreement, per the standard of proof required in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* I am satisfied that there is a high degree of probability that there is such an arbitration agreement which governs the dispute in question. Also, it appears to me that as set out in *Donohue v Armco* applying the general rule, the Plaintiff and Defendant have indeed bound themselves by an exclusive jurisdiction clause, as set out in the Employment Agreement. I am fortified in this view in that the Defendant in the California Proceeding has exhibited the Employment Agreement to its Complaint. On that basis I am inclined to agree that the Employment Agreement with the arbitration clause is prima facie valid and binding.

28. Second, the commencement and pursuit of the California Proceeding is contrary to the Defendant's promise under the Employment Agreement to resolve disputes only by way of arbitration in Bermuda governed by Bermuda law to the exclusion of any other law. In following *The Angelic Grace* per Millett LJ at 96R, permitting the Defendant to pursue the California Proceeding will deprive the Plaintiff of its contractual rights in a situation in which damages are manifestly an inadequate remedy. Further, following Steyn LJ in *Continental Bank v Aekos*, a claim for damages for breach of contract would be a relatively ineffective remedy. If the injunction is not granted, then the Defendant is likely to pursue the California Proceeding continuing their breach of contract and the Plaintiff's rights as set out in the Employment Agreement will prove to be valueless. Similar to Steyn LJ in *Continental Bank v Aekos* I am of the view that the pursuit of the California Proceeding will amount to vexatious and oppressive conduct.

29. Third, I am bound to consider whether there are any strong reasons why the Defendant should be permitted to pursue the California Proceeding. In assessing the criteria set out by Brandon J in *The Eleftheria*, again I recognize that I have only heard one from one side. However, the Plaintiff submits that there are no reasons let alone strong reasons. In their duty of full and frank disclosure, the Plaintiff submits that the Defendant may argue that the Employment Agreement is invalid as a matter of California law but counters that

argument by submitting that provisions of California law are irrelevant given the parties' express choice as to the governing law of the Employment Agreement. In light of the evidence before me, at this stage of my assessment, I am not able to identify any strong reasons why the Defendant should be permitted to pursue the California Proceeding.

30. Fourth, PCL acted promptly in enforcing its rights under the Employment Agreement by filing the application for an anti-suit injunction in less than a week after receiving notice of the California Proceeding. In following *The Angelic Grace* per Millett LJ at 96R, it is clear that the Plaintiffs have acted promptly and the California Proceeding is not at an advanced stage.

31. Fifth, in respect of any contention that the Plaintiff should have to appear in and litigate matters in the California Proceeding, similar to the view of Millett LJ in *The Angelic Grace*, I also find that proposition to be unattractive on the surer ground that the Defendant, by way of the Employment Agreement, expressly insisted "*upon Arbitration because of, among other things, is relative speed and cost effectiveness",* thereby promising not to put the Plaintiff to the expense and trouble of applying to that Court at all. On that basis, the grant of an anti-suit injunction would support the Plaintiff in not having to engage in the time, resource and expense of litigating in the California Proceeding.

32. Sixth – Full and Frank Disclosure - The legal principles of full and frank disclosure were set out in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* where Jacobs J stated:

> *"78. The duty of full and frank disclosure that without notice applications imply was summarized by Lawrence Collins J. in Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, at [180] as follows:*
>
> > *"On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts*

known to the applicant but also additional facts which he would have known if he had made proper enquiries: Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 ,1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

79. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it: see Toulson J in MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003] EWHC 3418 (Comm), at [25].

80. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-disclosure is non-culpable. Thus, in OJSC ANK Yugraneft v Sibir Energy [2008] EWHC 2614 (Ch), Christopher Clarke J. said at [106]:

"As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose.""

33. The Plaintiff made submissions in respect of its duty of full and frank disclosure that the Defendant submits in its Complaint in the California Proceeding that the arbitration clause does not arise as follows:

    a. The terms of the Employment agreement are vague and ambiguous as to how the arbitration should be initiated. However, PCL argues that on a proper construction of the arbitration clause, reliance is placed on the Arbitration Act section 15 which sets out the procedure for appointing an arbitrator including seeking the

determination of the Bermuda Court to appoint the same, a process they did in fact commence.

b. PCL's failure to object to an arbitrator proposed by the Defendant in a timely manner resulted in PCL waiving or forfeiting its right to enforce the arbitration clause. However, PCL acknowledged that delay could be a ground on which the Court could deny equitable relief but that the facts do not support the allegation of delay. It submits that the Defendant misrepresented the facts in that in the California Proceeding the Defendant exhibited emails that supported delay but left out PCL's responses and the full record of the parties' correspondence on mediation and selection of an arbitrator noting that PCL did respond that Mr. Burke did not meet the requirement of Article 14 of the Employment Agreement of 'experience in Bermuda'.

c. PCL also submits that as the parties had agreed to mediation in early 2021 in advance of arbitration, the selection of an arbitrator was not urgent in November and December 2020. Once efforts at mediation had failed, then PCL had ongoing discussions to appoint an arbitrator who met the requirements of Article 14 and then it commenced proceedings in the Bermuda Court to resolve the issue of the appointment of an arbitrator. The Plaintiff therefore states that in light of the circumstances, there is no basis to suggest that it has waived the exclusive arbitration clause in the Employment Agreement.

34. I have considered the submissions made in full and frank disclosure. As stated previously, I have only heard one side. At this point of my assessment, the full and frank disclosure has not undermined my views in respect of granting the application for an anti-suit injunction in respect of the California Proceeding.

Summary – Anti-Suit Injunction

35. In summary, in light of all the circumstances set out above in consideration of what protection this Court is being asked to give, I am guided by the case of *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* where the starting point is to act to protect the integrity of a contractual bargain reached between the parties. Also, in following *ACE*

Bermuda Insurance Ltd. v Continental Casualty Company and Continental Insurance Company where it cited *The Angelic Grace* about acting robustly, I am satisfied that this Court should act robustly in granting the application for an anti-suit injunction.

36. I find that the Plaintiff has made out a strong prima facie case that it would be unconscionable and unjust for it to be subjected to the California Proceeding and also that it is no doubt contrary to public policy. This is on the basis that the Plaintiff and Defendant have expressly agreed that in the event of a dispute, such dispute should be determined by a Bermuda arbitration, and where there is no question that if the Defendant were not to be restrained, the dispute between them would be determined by the California Court in the California Proceeding.

Leave to serve out of the jurisdiction

37. The Plaintiff has applied for leave to serve the Defendant out of the jurisdiction.

38. Rules of the Supreme Court (RSC) Order 11, rule 1(1)(d) provides that service out of the jurisdiction is permissible with the leave of the Court if, in the action:

> *"the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—*
>
> *(i) was made within the jurisdiction, or*
>
> *(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or*
>
> *(iii) is by its terms, or by implication, governed by the law of Bermuda, or*
>
> *(iv) contains a term to the effect that the Court shall have jurisdiction to hear and determine any action in respect of the contract;*

39. RSC Order 73, rule 7 provides

> *(1) Subject to paragraph (1A), service out of the jurisdiction of—*

(a) any originating summons or notice of originating motion under the Arbitration Act 1986 or the Bermuda International Conciliation and Arbitration Act 1993, or

(b) any order made on such a summons or motion as aforesaid,

is permissible with the leave of the Court provided that the arbitration to which the summons, motion or order relates is governed by the law of Bermuda or has been, is being, or is to be held within the jurisdiction.

(1A) Service out of the jurisdiction of an originating summons for leave to enforce an award is permissible with the leave of the Court whether or not the arbitration is governed by the law of Bermuda.

40. In *Athene Holding Ltd v Central Laborers' Pension Fund*[3] Hargun CJ stated:

"17. … in relation to the application to serve out, I accept the general submission that the Court has to be satisfied that there is a serious issue which is reasonable to be tried on the merits, i.e., a substantial question of fact or law or both; secondly, that there is a good arguable case that the Plaintiffs claim, made in the originating summons, falls within one of the jurisdictional gateways; thirdly, that in all the circumstances, Bermuda is clearly and distinctly the appropriate form for the trial of the dispute.

18. The first requirement is whether there is a serious issue to be tried on the merits, and what one has to show is that there is a realistic, as opposed to a fanciful prospect of success. A realistic claim is one that carries some degree of conviction. Accordingly, the issue is what are the prospects of obtaining an injunction in these proceedings; …"

41. In *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 Lord Mance stated:

[3] [2019] Bda LR 48

"50.. In circumstances where an arbitration claim includes under CPR62.2(d) "any other application affecting (i) arbitration proceedings (whether started or not); or (ii) an arbitration agreement", the requirement in CPR62.5(c)(ii) that "the seat of the arbitration is or will be within the jurisdiction" must be read as satisfied if the seat of any arbitration, if any were to be commenced or proposed under the arbitration agreement, would be within the jurisdiction"...

"51. I add only that in the present case, although leave was in fact obtained under CPR PD 6B, paragraph 3.1(2) and CPR62.5(1)(b) and (c), the court would appear also to have had jurisdiction to give leave for service out of the jurisdiction under CPR PD 6B(6)(c), on the ground that, treating the arbitration agreement as the "contract", the claim was "made in respect of a contract where the contract .... (c) is governed by English law"."

42. In *ACE Bermuda Insurance Ltd. and Continental Casualty Company* [2007] SC Bda LR 12 Ground CJ stated:

"6. The plaintiff argues that it is bringing this action to enforce the arbitration clause, which is expressly governed by the law of Bermuda. I accept that and think, therefore, that there is a good arguable case that this action is within the rule. It matters not that the defendants are not parties to the contract as a whole or to the arbitration clause: see DVA v Voest Alpine [1997] 2 Lloyd's Rep. 279 at 287:

> *"There are only two relevant questions: Is there a contract? Is the plaintiff seeking to enforce that contract against the defendant?""*

43. In *ACE Bermuda Insurance Ltd. and Continental Casualty Company* [2007] Bda LR 38 in respect of an application to set aside the order of the Chief Justice in the case in the previous paragraph, Bell J stated:

"27. In my view there is no justification for going beyond the words of the sub-rule, and on the basis of the words themselves I am satisfied, and find, that these proceedings brought by ACE against Continental are indeed within the ambit of the sub-rule, insofar as they are proceedings which seek to enforce or otherwise affect the contract (which ACE has with 3M) against Continental. I find that ACE has demonstrated that it has a good arguable case that its claim falls within the relevant head of Order 11, and that there is a serious issue to be tried arising out of the underlying claim. I further find that the case is a proper one for service out of the jurisdiction pursuant to Order 11 rule 4 (2), since I am satisfied that the issues for trial in these proceedings properly fall to be determined in the Bermuda Court, on the basis of the provisions of the arbitration clause."

44. The Plaintiff submitted that leave to serve out should be granted for several reasons as the test cited in *Athene Holding Ltd v Central Laborers' Pension Fund* had been met in that the circumstances of the present case justify granting leave to serve out. In my view, I agree with those submissions for several reasons.

45. First, PCL submits that there is a good and arguable case against the Defendant as a proper party and that the case falls under Order 11, rule 1(1) of the RSC as the Employment Agreement has the arbitration clause which applies to the dispute. It includes a term providing that "*any and all disputes whatsoever shall be governed in all respect by the laws of Bermuda"*. The Defendant has already submitted to arbitration and what remains to be seriously determined is the selection of the arbitrator, not whether the parties must arbitrate the dispute. Also, leave may be granted under RSC Order 73, rule 7(1)(a) which expressly provides for leave to serve out an Originating Summons pursuant to the Arbitration Act. I agree with both these submissions for the reasons submitted.

46. Second, PCL submits that there is a serious issue to be tried as the parties have been unable to agree on the selection of an arbitrator. In my view, the evidence shows that the selection of the arbitrator is the issue and that needs to be resolved in order for the arbitration to proceed. Therefore, on the face of it, at this stage I find that there is indeed a realistic, rather than fanciful, prospect of success of an injunction on this point. The Employment

Agreement has the clause which incorporates the Arbitration Act which allows for this Court to resolve the issue of selection of the arbitrator, the parties having failed to do so.

47. Third, PCL submits that Bermuda is the forum conveniens. The Employment Agreement includes a term that the arbitration is to be held in Bermuda. Further, leave to serve out may be granted under Order 11, rule 1(1)(d) of the RSC since the Originating Summons is brought pursuant to the Bermuda Arbitration Act 1986 and the arbitration if held would be held in Bermuda and its procedure would be governed by Bermuda law as well as the arbitration agreement was made in Bermuda. In my view, at this stage, I am satisfied that Bermuda is the appropriate forum for the trial of the dispute.

Conclusion

48. For the reasons above, I granted the applications and signed the Order that:

Leave for Service of process out of the Jurisdiction

a. The Plaintiff has leave to issue a Concurrent Originating Summons in the same terms as the Originating Summons dated 10 March 2021.
b. The Plaintiff has leave to serve a sealed copy of the Concurrent Originating Summons on the Defendant or his counsel outside the jurisdiction.
c. The Defendant have 28 days after service of the Originating Summons to enter an appearance in response to the Originating Summons.
d. Service shall be deemed to have been effected on the date on which delivery is made pursuant to the order.

Interim Injunction

e. An interim injunction restraining the Defendant from taking any further steps to advance or otherwise positively participate in the California Proceeding other than steps taken to obtain a stay of those proceedings pending the determination of the Plaintiff's application before this Court for the appointment of an arbitrator or such further order of this Court.

f. The Defendant shall have liberty to apply to this Court at any time to vary or discharge this Order with terms for notice and filing evidence.

g. Costs to be reserved.

Dated 12 April 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT