Neutral Citation Number: **[2020] EWHC 1078 (Comm)**

Case No: CL-2020-000136

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN THE MATTER OF AN ARBITRATION CLAIM

Royal Courts of Justice,
Rolls Building
Fetter Lane,
London,
EC4A 1NL

Date: 5 May 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

Times Trading Corporation	**Claimant**
- and –	
National Bank of Fujairah (Dubai Branch)	**Defendant**

- -
- -

Mr David Lewis Q.C. and Ms Hannah Glover (instructed by **Reed Smith LLP**) for the **Claimant**
Mr Steven Berry Q.C and Mr John Robb (instructed by **Campbell Johnston Clark Limited**) for the **Defendant**

Hearing date: Tuesday 24 March 2020
Draft Judgment sent to parties: 23 April 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am on Tuesday 5 May 2020

Mrs Justice Cockerill:

Introduction

1. This is the Claimant's ("Times") application for an interim anti-suit injunction restraining National Bank of Fujairah (Dubai Branch) ("NBF"), from prosecuting or continuing proceedings it has commenced against Times in the High Court of the Republic of Singapore. The basis for the application is that such proceedings have been commenced in breach of NBF's contractual obligation to arbitrate in London.

2. NBF is said to be the holder of 27 Bills of Lading issued in respect of cargo shipped on the MV "ARCHAGELOS GABRIEL" (the "Vessel"), which cargo was discharged against letters of indemnity ("LOIs") between 10 and 20 June 2018. NBF pursues misdelivery claims on the basis that it was holder of the Bills of Lading. The Bills of Lading, as NBF accepts, contain a binding clause referring disputes to London arbitration.

3. The dilemma arising in this case concerns the identity of NBF's contractual counterparty (and in particular whether Times was the bareboat charterer of the Vessel), the application of the Article III Rule 6 time-bar, as between Times and NBF, and the proceedings now pending both here and in Singapore.

4. No substantive step has yet been taken in the proceedings in Singapore following service of the claim, and NBF has previously confirmed to the High Court of Singapore (in terms the significance of which is contentious) that it intends to stay the claim against Times in favour of London arbitration, though no such application has been issued to date. The Singapore High Court has suspended directions which it had previously made for the filing of pleadings or any stay application in Singapore, while making clear that this does not prohibit NBF from filing its Statement of Claim in Singapore if so advised.

5. Times' application for an anti-suit injunction previously came before Andrew Baker J on an urgent without notice basis on 10 March 2020. Andrew Baker J adjourned the application to be heard formally on notice to NBF; and granted Times permission to serve the proceedings out of the jurisdiction on NBF's lawyers in Singapore. His concern, aside from urgency, was as to issues of delay and the question of treatment of the time-bar defence which lies at its heart.

6. I heard argument on this application remotely on 24 March, and shortly thereafter communicated my decision to the parties, with these fuller reasons to follow.

Background

The facts

7. On or about 11 May 2018, the MV "ARCHAGELOS GABRIEL" loaded 55,100 MT of steam (non-coking) coal of Indonesian origin (the "Cargo") in bulk in East Kalimantan, Indonesia. The Vessel is owned by Rosalind Maritime LLC ("Rosalind").

8. 27 Bills of Lading were issued (the "Bills of Lading") on the Congenbill 1994 form on or around 11 May 2018 on behalf of the master. As noted above, NBF claims to be the lawful holder of 27 Bills of Lading in respect of cargo shipped on the Vessel.

9. The Cargo was discharged between 10 and 20 June 2018 at Navlakhi Port, India without production of the original Bills of Lading against LOIs.

10. The Bills of Lading contain a General Paramount Clause pursuant to which it is common ground, for present purposes, that the 12-month time bar under Article III Rule 6 applies to NBF's misdelivery claims.

11. It is more or less common ground that the Bills of Lading also incorporate an arbitration clause requiring disputes to be submitted to London arbitration, that that clause is found in a voyage charterparty between Trafigura Maritime Logistics Pte Ltd and Harmony Innovation Shipping Pte Ltd ("Harmony") dated 25 April 2018 and that it provides:

> "54 LAW & ARBITRATION
>
> 54.1 This Charterparty, any question regarding its validity, existence or termination, and any non-contractual obligations arising from or connected with it shall be governed by and construed in accordance with English law.
>
> 54.2 Any dispute arising out of or in connection with this Charterparty (including any question regarding its validity, existence or termination and any non-contractual obligations arising from or connected with it) shall be referred to arbitration in London before three arbitrators in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof…". (emphasis added)

Certainly no other potential clause has been identified.

12. On that basis, NBF was required to bring "*suit*" against the carrier for misdelivery by 20 June 2019, at the latest.

13. NBF, through its Singapore solicitors, Rajah & Tann Singapore LLP ("R&T"), asserted a claim for misdelivery against the carrier, which was addressed to Vessel's registered owner, Rosalind Maritime LLC ("Rosalind") "c/o Times Navigation Inc." on 28 December 2018. Waterson Hicks replied that day. The reply stated that they acted for Owners, and took no issue with the addressing of the claim. NBF says that response implied, and led NBF to believe, that Rosalind was the carrier.

14. No immediate favourable response to the claim was received and on 2 January 2019 NBF issued an *in rem* Writ of Summons in the High Court of the Republic of Singapore under case number HC/ADM 2/2019 (the "Singapore Proceedings"). That writ was addressed in standard form to *"Owners and/or Demise Charterers and/or other persons interested in …"* the Vessel. It was issued by NBF as "*lawful holders and/or indorsees of the Bills of Lading*" and claimed "*against the Defendants as carriers… (a) Damages for breach of the contract(s) of carriage contained in and/or evidenced by the Bills of Lading…*". There were alternative claims in tort and bailment.

15. With the spectre of arrest in the air, given that Harmony were concerned about this obvious possibility, an Order was obtained by Harmony requiring Trafigura Pte Ltd ("Trafigura") to provide full security for NBF's claims. Such security was provided on 11 February 2019; Trafigura caused a guarantee to be issued by Sumitomo Mitsui Banking Corporation Europe Limited ("SMBC") to NBF in the sum of US$4.65m ("the Guarantee").

16. On 15 February 2019 Trafigura, Times, Rosalind and Trafigura Maritime Logistics Pte Ltd entered into a Claims Handling and Cooperation Agreement ("the Cooperation Agreement"), pursuant to which Trafigura became responsible for handling NBF's misdelivery claims on behalf of Rosalind and Times, which is described in the agreement as the bareboat charterer of the Vessel. Neither that agreement nor the operative charterparty was provided to NBF at this point.

17. On 4 June 2019, and thus within 1 year of discharge, NBF commenced London arbitration proceedings against the carrier for misdelivery by a notice addressed to *"Rosalind Maritime LLC, Owners of the Vessel "Archagelos Gabriel" c/o Times Navigation Inc*". Also within the 1-year limit Holman Fenwick Willan ("HFW") replied, saying that they acted for Trafigura "*who have the conduct of the defence of your clients'*

alleged claims". The letter did not identify exactly for whom Trafigura acted. The letter did not mention any Bareboat Charter. It said that their clients proposed to appoint an arbitrator, while in general terms reserving rights in respect of the validity of the notice of arbitration. NBF say HFW acted presumably on behalf of and with authority from Rosalind and Times under Clause 2 of the Claims Handling and Cooperation Agreement.

18. After the 1 year time limit had expired, on 10 July 2019, Reed Smith, stating that they acted for "Owners" appointed an arbitrator for the carrier; and then, on 19 July 2019, sent a letter indicating that the Vessel was under Bareboat Charter to Times when the Bills of Lading were issued:

> "We note that the Notice of Arbitration purports to commence an arbitration against Rosalind. However at the material time the Vessel was bareboat chartered to Times Trading Corp… The Bills of Lading were not issued by Rosalind but were issued by Times. Accordingly, we do not accept the validity of the Notice of Arbitration and our client will contend that the Notice of Arbitration purports to start an arbitration against the wrong party."

19. NBF sought unsuccessfully in correspondence to obtain disclosure and particulars of the alleged bareboat charterparty. A copy of the alleged Bareboat Charter was ultimately disclosed on 9 March 2020 on Times' application in this action.

20. Discussion as to the terms of the security ensued. On 7 November 2019, at NBF's request, Reed Smith on behalf of Trafigura confirmed that the Guarantee was to be read such that "*references to the word "Owners*" are a reference to the legal entity being the "Carrier" (as determined by the competent Tribunal and/or on appeal by the competent Courts) under the Bills of Lading".

21. Following this debate, on 9 November 2019, NBF served on the Vessel the *in rem* Writ of Summons in the Singapore Proceedings. It says that its reasons for doing so related to the fact that there had been no actual draft of an amended Guarantee provided as well as the fact that there were questions still live over the contractual chain.

22. A memorandum of appearance was subsequently entered by Resource Law LLP (an affiliate of Reed Smith, Times' solicitors in this jurisdiction) on behalf of both Rosalind and Times in relation to the Singapore Proceedings.

23. The Guarantee was formally amended on 18 November 2019 to include "*Demise Charterers*" within the definition of "*Owners*".

24. On 26 February 2020, NBF was paid out the full sum of US$4.65m under the Guarantee.

25. A series of pre-trial conferences ("PTCs") has taken place in the Singapore Proceedings, on 26 December 2019, 9 January 2020, 23 January 2020, 27 February 2020 and 19 March 2020. NBF says Times has been less than forthcoming about the alleged bareboat charter and the position *vis a vis* Rosalind and Times. Thus, in the first PTC on 26 December 2019, NBF asked whether Resource Law acted for Rosalind or Times, and was told: "*Our position for the Singapore proceedings is that we do not take any position*". On 7 January 2020, ahead of the second PTC, Resource Law said that they acted for both Rosalind and Times.

26. Most of the debate to date in the Singapore Proceedings has been to do with the possibility of a stay in favour of London arbitration:

    i) In the 9 January 2020 hearing, and since, NBF indicated willingness for the Singapore Proceedings to be stayed in favour of London arbitration. The parties were directed to discuss and attempt to agree a stay before the next PTC.

    ii) On 23 January 2020, NBF is recorded as having submitted that "*We will be seeking a stay ideally by consent.*" NBF says that what it had in mind was a stay on terms. The Court directed that any stay application was to be filed by 13 February 2020.

    iii) Neither party filed a stay by 13 February 2020 as directed. There was no discussion between the parties before that deadline about staying the Singapore Proceedings by consent.

    iv) On 25 February 2020, R&T wrote to Resource Law to propose a stay of the Singapore Proceedings on condition of waiver by Times of any time bar defence. This was rejected on 26 February 2020.

    v) At the hearing on 27 February 2020, the Court directed that any application for a stay was to be filed (by either NBF or Times) by 12 March 2020, failing which NBF was to file and serve its Statement of Claim (also by 12 March 2020).

    vi) On 4 March 2020, R&T wrote to Reed Smith:

> "Our clients reserve the right to proceed to a determination of liability in the Singapore proceedings as against "Times Trading Corp", which is a matter for the jurisdiction of the Court here. Our clients are not in a position to agree an unconditional stay of the Singapore court proceedings in relation to Times Trading Corp for the self-same reasons."

vii) Following the 10 March 2020 hearing before Andrew Baker J, a further PTC took place in Singapore on 19 March 2020. The Singapore Court revoked the directions made on 27 February 2020 and indicated that there was no restriction on NBF progressing the Singapore Proceedings by filing its Statement of Claim if it wished to do so.

viii) The next PTC in Singapore was set for 16 April 2020.

The London arbitration

27. No substantive progress has been made in the London arbitration. Whilst both NBF and Rosalind have nominated an arbitrator, the Tribunal is yet to be constituted.

28. Rosalind has written to NBF inviting it to propose reasonable directions to facilitate determination of the issue as to the identity of the carrier.

29. NBF has also indicated in evidence served on 17 and 19 March 2020 that it will contend "*insofar as it is necessary to do so*" that its Notice of Arbitration was also effective to commence arbitration against Times. It is common ground that the question of against which party the Notice of Arbitration was effective to commence proceedings is itself a matter to be determined in London arbitration.

30. On 9 March 2020 (two working days after NBF's communication of 4 March 2020), Times issued this application to injunct NBF from pursuing its claims against Rosalind in the Singapore High Court.

31. NBF has indicated that it will consent to an unconditional stay of the Singapore Proceedings against Rosalind. Its position however remains that it will not consent to an unconditional stay against Times.

NBF's application under section 12 Arbitration Act 1996

32. On 20 March 2020 (two working days before the present hearing), NBF issued an application to extend time for NBF to commence arbitration against Times in London. That application is made under section 12 Arbitration Act 1996, which provides:

> "12.— Power of court to extend time for beginning arbitral proceedings, &c.
>
> (1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant's right extinguished, unless the claimant takes within a time fixed by the agreement some step—

> (a) to begin arbitral proceedings…
>
> the court may by order extend the time for taking that step.
>
> (2)…
>
> (3) The court shall make an order only if satisfied—
>
> (a) …, or
>
> (b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question."

33. NBF's application to extend time is said to be made on a "*conditional or protective basis*" on the premise that the Bills of Lading were issued on behalf of Times.

34. I do not have to consider this application today, but note that it appears that that application will be opposed and that it will be Times' position that the application has been made late.

35. I also note that the power of the Court under section 12 is less wide than it was under its predecessor, section 27 of the 1950 Act. As Geoffrey Brice QC noted in *Cathiship v Allansons (The Catherine Helen)* [1998] 2 Lloyd's Rep. 511 *"it is not open to the Court to extend time now because the Court considers in general terms that it would be just to do so"* where the power was described as *"markedly more restrictive"* than that which pertained under the 1950 Act. Ambrose, Maxwell and Collett in *London Maritime Arbitration* (4th Edition) at paragraph 9.30 indicate that *"the test will be extremely difficult to satisfy and an extension will only be granted if the circumstances are entirely out of the ordinary."*

36. There is thus in the background to this application a dispute between the parties as to the identity of the carrier at the time the Bills of Lading were issued, and therefore the proper counterparty to those Bills:

    i) Times asserts that it was the carrier on whose behalf the Bills of Lading were issued, pursuant to a Bareboat Charter dated 27 April 2018 between Times and the Vessel's owner, Rosalind.

    ii) NBF asserts that the Bareboat Charter is a sham. It does not accept that there was any genuine contract between Times and Rosalind in those terms.

37. There are also disputes, which are not for today, as to whether the Notice of Arbitration was effective to commence proceedings against

Times as well as Rosalind and the time-bar not applying to misdelivery claims.

Applicable Principles

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

    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]. 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.

39. The issues in this case relate to refinements on these broader principles.

Issue 1: Is this a case where the *Angelic Grace* test applies?

40. The first question is whether there is a relevant arbitration clause – at least to the standard of "*high degree of probability*".

41. That is a question which is posed in the context of "contractual" anti-suit injunctions to be sure that this Court does not grant relief unless it can be relatively sure that there is a relevant arbitration clause.

42. There is also, of course, the possibility of an anti-suit injunction in non-contractual cases on the basis that the litigation is frivolous or vexatious. However, the requirements for vexation or oppression are more onerous and more nuanced than those which apply in a contractual case. This application is not made on this basis. It has been brought and argued essentially on the basis that this is, or should be treated as being, a contractual case.

43. This underpins the point taken by NBF, which is that there is an issue as to who is the carrier, and in those circumstances the Court cannot be satisfied that there is an arbitration clause between these two parties. The point being that the default position is that the arbitration clause in question needs to be an arbitration clause between those two parties – not an arbitration clause at large.

44. This is an argument which has taken the debate into a juridically fascinating area – what has been dubbed the "*quasi-contractual anti-suit injunction*", described in Raphael "*Anti-Suit Injunctions*" (2nd ed. 2019) as *"injunctions which are granted where the injunction defendant may not fully be party to and bound by a contractual forum clause as a matter of contract law, but should nevertheless be required to comply with the effect of the clause "as if" the injunction was contractual."* In such cases an injunction may be granted even though the requirement of showing an arbitration clause between the parties to the requisite standard could not be met.

45. This is an area of law which has been developed in a fairly limited series of cases, most notably: *The Yusuf Cepnioglu* [2016] 1 Lloyd's Rep 641 (CA) at [32]-[35] *per* Longmore LJ, [49]-[50], [55] per Moore-

Bick LJ and *Dell Emerging Markets (EMEA) Ltd v IB Maroc SA* [2017] EWHC 2397 (Comm) at [34] *per* Teare J.

46. The argument before me proceeded substantially on the basis that the issue was about whether this was a quasi-contractual case, although technically Times' position was that the case was either a contractual or a quasi-contractual case.

47. Times submits that:

    i) In quasi-contractual cases, the question is not who is party to the arbitration agreement, but whether the dispute in question is governed by the arbitration clause. The focus is whether the foreign Claimant is, in substance, asserting a contractual liability. It points me to examples of this issue being considered in *Dell v Maroc* at [19]-[20]; *The Yusuf Cepnioglu* at [14]-[16]; *Qingdao Huiquan Shipping v SDHX* [2019] 1 Lloyd's Rep. 520 at [33]-[34].

    ii) The test is satisfied because this is a case which is or is analogous to the quasi-contractual cases. Reference was made to *The Yusuf Cepnioglu* as being a case where no one could suggest that there was a high degree of probability that the party resisting the injunction was party to the arbitration agreement, but once the claim was deemed contractual, the P&I club in question could show that there was an equitable right not to be sued in Turkey.

    iii) There need not be a legal a right not to be sued – an equitable right will suffice: by reference to both of these cases as well as the *Qingdao* case.

    iv) It can therefore discharge the burden upon it in that the Singapore claim itself is contractual – in that it is made under the contract of carriage and for damages for breach of that agreement; it is common ground that the Bills of Lading contain a London arbitration clause. Thus it says that whoever is the carrier, they are entitled to the benefit of the arbitration agreement.

48. For NBF, what is said is that:

    i) Times' reliance on *The Yusuf Cepnioglu* and similar cases is not apt. Its submission is that there are two principles.

    ii) The first is that derived from the *Jay Bola* (and pursued into the *Yusuf Cepnioglu*). That is applicable where someone who is not party to contract sues on it – in such circumstances the authorities say they are bound by arbitration cause, and the Defendant can obtain an injunction. That situation is nothing to do with this case.

iii) The second is what one might term the *Dell* principles (also seen in *Qingdao* and others). In those cases the injunction claimant denies that it is a party but is still sued abroad on the basis that it is party. Those cases explain that in this situation the injunction claimant can say: *"whilst I deny that I am a party, you say I am - and on that basis the relief is available to me"*.

iv) This is also not the present case in that Times asserts it is party to the contract, and the case that Times is a party is an alternative to the primary case that Rosalind is a party.

v) On this basis, the contractual test cannot be met and any injunction would have to proceed not on the same quasi-contractual basis as the *Ust*-type cases but on the basis of unconscionability – frivolity and vexation – as alluded to in *Dell* [34]. And any application on this basis is, NBF says, bound to fail. This could not be a case of vexation, because it is driven by the time bar issue and the reasons why the proceedings have been brought – which are far from frivolous.

Discussion

49. There is much in what NBF says. Times is in a difficult situation here, because it does not seek to have the issue of whether there is a contract between it and NBF determined as part of this enquiry, so as to hit the contractual target, and the present case is not exactly on all fours with any of the previous quasi-contractual cases.

50. As the focus of argument has been on the quasi-contractual cases, I will deal with that aspect first.

51. NBF is quite right to say that there are, broadly speaking, two categories in focus within the quasi-contractual ASI cases. One is the "*quasi-contractual/derived rights*" category – namely where the existence of the contract is not in doubt, but the person who has brought proceedings which are sought to be enjoined is not a direct party to that contract.

52. This type of case was considered in the *Jay Bola* – a case where insurers of a cargo sought to bring proceedings in Brazil, though their claim was a subrogated one based on a Charterparty containing a London arbitration clause. In that case Sir Richard Scott V-C said:

> "WAV is bound by the arbitration agreement not because there is any privity of contract between WAV and DVA but because Voest's contractual rights under the sub-charter-party, to the benefit of which WAV has become entitled by subrogation, are subject to the arbitration agreement which, too, is part of the sub-charter-party. WAV cannot enforce those contractual rights without accepting

> the contractual burden, in the form of the arbitration agreement to which those rights are subject."

53. Hobhouse LJ's formulation was:

> "The present case falls clearly within the scope of [the Aerospatiale] jurisdiction because the application of the time charterers for an injunction has been made to protect a contractual right of the time charterers that the dispute be referred to arbitration, a contractual right which equity requires the insurance company to recognise."

54. That is analogous to (and takes some inspiration from) the principle that a party may not claim under a bill of lading without also assuming the burden, including the mutual obligation to have any dispute falling within the scope of an arbitration clause determined in arbitration: *The Sea Master* [2019] 1 Lloyd's Rep 101.

55. In this kind of case the landing point (after the slight detour provided by the *Hari Bhum* [2005] 1 Lloyd's Rep. 67) was resolved in the *Yusuf Cepnioglu*. That case was one where a charterer brought proceedings against the owner's P&I insurer, in circumstances where the insurance contract was subject to a London arbitration clause. Longmore LJ decided (at [35]) that *"as a matter of principle, therefore, the right approach is to apply The Angelic Grace and ask whether there are good reasons why an injunction should not be granted. There is no need for the Club to show vexatious or oppressive conduct"*. This was because the third party claiming derived rights was bound in equity to respect the contractual obligation in the forum clause to which the rights were originally subject.

56. Moore Bick LJ agreed with him ([39]) but indicated in his "observations" that he reached the same analysis by a different route, saying at [55]:

> "The commencement of proceedings contrary to the arbitration clause is, … sufficiently vexatious and oppressive, or at any rate sufficiently unconscionable and unjust, to provide sufficient grounds for the court's intervention by way of the equitable remedy of an injunction. The position is no doubt at its clearest when the proceedings are between original parties to the arbitration agreement, but the rationale of the decision in the '*Angelic Grace'* applies equally to both cases."

57. MacFarlane LJ agreed with both Longmore LJ and Moore-Bick LJ.

58. As Raphael states at paragraph 10.75:

> "The difference, to the extent there is one, is that Longmore LJ is saying that the *Angelic Grace* applies; Moore Bick LJ is saying that in the quasi-contractual situation, vexation and oppression should be treated as applying in parallel to the *Angelic Grace*. The result is almost the same."

59. Other cases which fall within this cohort are the following (I have here and below for completeness strayed slightly beyond the authorities to which I was actually referred in argument):

    i) *Sea Premium Shipping Limited v Sea Consortium* (David Steel J 11 April 2001): a vessel which had been under charter (with a London arbitration clause) was purchased by new owners. The charterers commenced an action against the new owners in Dubai. The charterers said that the new owners were (under Dubai law) party to or bound to respect the charterparty. That was denied by the new owners.

    ii) *Starlight Shipping v Tai Ping Insurance ("The Alexandros T")* [2008] 1 Lloyd's Rep. 230: insurers of the owners of a lost cargo, carried under bills of lading containing London arbitration clauses, commenced proceedings in China.

    iii) *Ace Seguradora v Fair Wind Navigation* [2017] EWHC 3352 (Comm) this was a claim brought to restrain proceedings brought against a vessel manager by subrogated insurers where that claim was formulated as a contract claim on a bill of lading incorporating an arbitration clause. Although authorities were cited, they are not dealt with in the judgment.

60. The second group is what Raphael has dubbed "*Inconsistent Contractual Claims*" – which was referred to before me as the *Dell/Qingdao* line of cases. These are cases where (again borrowing from Raphael's analysis – this time at [10.81]):

> "the injunction Claimant denies the very existence of the contract under which he is sued, or otherwise denies the validity of the contract in a way which would also impeach the exclusive forum clause, or denies that he owes any contractual duties to or has any contractual rights against the injunction Defendant … but the injunction Defendant in effect seeks to make a claim under the contract, while not seeking to respect the forum clause which forms part of it."

61. Before moving on, it is worth reviewing the facts of the relevant cases across this second cohort:

    i) *The MD Gemini* [2012] 2 Lloyd's Rep. 672: bunker suppliers brought proceedings in Florida and in the Marshall Islands against the shipowners seeking the price of bunkers supplied to the vessel. The shipowners denied that they (rather than charterers) were liable but sought an anti-suit injunction restraining the proceedings in Florida and the Marshall Islands on the grounds that the contract on which the claim was based contained an exclusive jurisdiction clause in favour of the English Courts.

    ii) *Dell Emerging Markets v IB Maroc.com* [2017] EWHC 2397 (Comm): IB Maroc sued Dell UK, with whom it had a contract containing a jurisdiction clause in favour of these courts and Dell Maroc (with whom it had no direct contract) on the basis that there was joint liability with Dell UK under the contract. Dell Maroc denied any contractual or quasi-contractual liability and sought an anti-suit injunction.

    iii) *Qingdao Huiquan Shipping v SDHX* [2019] 1 Lloyd's Rep 520 per Bryan J: a settlement agreement containing a London arbitration clause had been reached between shipowners and cargo receivers which involved the payment of sums to the owners by SDHX, the receivers' "authorised agent". SDHX sued the owners in China seeking repayment under the settlement agreement. Owners sought an anti-suit injunction.

    iv) *XL Insurance Co v Little* [2019] EWHC 1284**:** Mr Little, who claimed to be insured under a policy of D&O insurance sued the insurer in New York. Insurers sought an ASI, though denying the existence of the policy (Injunction sought by the party denying the contract).

62. I concur with the view expressed in Raphael, at paragraphs 10.85 and following, that there is no very consistent juridical underpinning in these cases. The cases do not resolve the question which remains hanging after *The Yusuf Cepnioglu* (or the analogous issue in this context) as to whether the appropriate test is that of the *Angelic Grace* "*applied quasi-contractually by analogy*" or the analysis of vexation and oppression, regarding the inconsistent claims as giving rise to a strong factor militating in favour of finding vexation – but with the attendant tail of the capacity for other factors within the analysis to defuse that indicator in favour of vexation. Nor do the cases grapple with the question of whether, if the correct approach is the *Angelic Grace* one, that is because of an estoppel or some other

form of equity. It may perhaps be a rare case for which this distinction matters.

63. So far the analysis runs thus. In the *MD Gemini* (obiter): the court at [15] assumed that an injunction would be available "*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 their 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 a not a party to that contract.*"

64. *Starlight Shipping v Tai Ping* did not explore the quasi-contractual cases but concluded that whilst "*the claim against the Managers appears to be hopeless, and therefore vexatious and oppressive, as a matter of English law there is no jurisdiction in this court to restrain the Cargo Owners and Insurers from proceeding against them in China.*"

65. In *Dell v IB Maroc* one can discern a dual approach.

    i) In analysing *Sea Premium* the judge put it this way: "*The basis of such an injunction must be that it is inequitable or oppressive and vexatious for a charterer to bring a contractual claim without respecting the arbitration clause in the charterparty, notwithstanding that the party seeking the injunction denied that it was bound by the charterparty.*"

    ii) However at [34] it was put thus: "*it would be inequitable or oppressive and vexatious for a party to a contract, in the present case IB Maroc, to seek to enforce a contractual claim arising out of that contract without respecting the jurisdiction clause within that contract. If the approach of Longmore LJ in The Yusuf Cepnioglu is applicable to the present case the reason is simply that IB Maroc, when seeking to enforce a contractual right, is bound to accept that its claim must be* '*handled through the English courts*' *as required by the contract in question.*"

66. *Qingdao Huiquan Shipping v SDHX* [2019] 1 Lloyd's Rep 520: Bryan J held ([31]) that the essential basis of the quasi-contractual injunction is that the foreign Claimant "*is not entitled to found a claim on rights arising out of a contract without also being bound by the forum provisions of that contract.*"

67. The *Little* case does not advance the analysis – the application was unopposed and there was no consideration of the juridical basis for the injunctive relief. Popplewell J simply proceeded on the basis that the *Angelic Grace* test was applicable.

68. In the final analysis it appears to me that thus far the thinking appears linguistically to tend to the "vexatious" rather than the "quasi-contractual" analysis, but that the rationale for that approach (where this has been explored) is based firmly in a quasi-contractual "benefit and burden" analysis, redolent of approaches in the cases concerning assignment, and bills of lading. As such I would consider that it is different from the analysis of Longmore LJ in textual content but not in overarching terms and that it has little or no difference to the approach of Moore-Bick LJ in the same case.

69. Underpinning these two distinct factual paradigms within the quasi-contractual injunction authorities there is therefore discernible a common and consistent thread, which is to apply the *Angelic Grace* approach at least by analogy.

70. Against this background I turn to consider this case and the submission that it is not analogous to these two cohorts. Looking first at the inconsistent claims cases, the case appears on one level to fit within the paradigm, because the Defendant denies (as its primary case) that there is a contract with Times. However that does not make it an inconsistent claims case in the sense of the authorities so far, because those have to date been cases where the person sued in the "other" forum denies the contract but prays it in aid (in a quasi-estoppel sense) in support of an anti-suit injunction for which it applies when the person who does assert the contract acts inconsistently with the jurisdiction provisions of the contract. The rationale is that enunciated by Teare J in *Dell*: X, when seeking to enforce a contractual right, is bound to accept that its claim must be handled in jurisdictional terms as required by that contract on which it relies.

71. Here, however, we have an injunction sought by Times (who positively asserts a direct contract) in support of an anti-suit injunction against NBF who denies that contract, but has nonetheless made Times a party to the Singapore proceedings - on a "*belt and braces*" basis.

72. Nor, however, is this a "derived rights" case akin to *The Yusuf Cepnioglu* and that line of authorities. NBF does not claim through anyone else. It is an original party to a contract – it is just controversial with whom that contract is.

73. As noted above, what both lines of authority have in common is the same underpinning – that it would be invidious to permit someone who is invoking a contract as the basis for its claim to do so otherwise than in accordance with the jurisdictional regime of that contract, to which they have either themselves agreed or to which they claim some right to enforce.

74. Yet here it might be said that NBF is not within either the factual boundaries of the categories or the boundary of the rationale, because it is NBF who denies the existence of the Times demise charter. The result, says Mr Berry QC for the Defendant, is that the *Angelic Grace* analysis (even by extension) cannot apply, and Times is driven back onto a pure "frivolous and vexatious" analysis, to which the Defendant has answers – and which is not the basis for the application made.

75. I am not persuaded by this argument. It seems to me that while the present case does not fall squarely within either of the two paradigms, it does in essence fall within the boundary delineated by that common underpinning. The key point is that the Defendant has adopted a somewhat Janus-faced approach. It may on one level deny the contract, but it has also brought a claim asserting the Times demise charter in Singapore. It may be the case that the claim against Times is a secondary, "belt and braces" case. But it asserts the contract. The claim was originally issued in the context of obtaining security for the contractual claim, even if the proceedings were apparently later served more with an eye to obtaining disclosure to bottom out the position on the asserted demise charter.

76. Further this is not a case where characterisation of the claim is really in issue. In some of the cases there is an issue as to whether the foreign proceedings are truly contractual in nature. In *ACE Seguradora* there was a late occurring argument as to the nature of the claim being asserted. Here (although the pleaded case encompasses bailment and tort) it has never been said that the real nature of the claim is non-contractual; the dispute is all about the contract – the issue is whether the contract Times asserts is real, or a sham.

77. In my judgment not only is there no principled distinction to be drawn between at least the "derived right" cases and this in a situation where NBF asserts the contract in some form in Singapore, but also it would be thoroughly illogical if relief were available on effectively contractual principles in a case such as *Qingdao* - where the contract is denied by the person seeking relief - and available only on less generous terms here where the party seeking relief positively asserts the existence of the contract.

78. So much for the quasi-contractual analysis – if the case is to be regarded as not contractual, I am satisfied that it should, like the existing quasi-contractual cases be treated "as if" it were a contractual case, applying the *Angelic Grace* test by analogy.

79. However, it is perhaps worth also simply reviewing the position as to whether a simple contractual analysis is applicable. If there is a bareboat charter it is common ground that this would be the case. NBF argues that this cannot apply because, in the light of the dispute

as to the reality of the charter, the relevant high standard of proof of the contract and hence the operative arbitration clause cannot be met.

80. I am not asked to determine this point at this stage. But does it follow that I cannot (based on the evidence before me) conclude that this hurdle is cleared? I do not think it does. In circumstances where (i) I can see what appears to be a bareboat charter to Times (ii) I can see a Claims Handling Agreement pre-dating the one year time bar, which names Times as bareboat charterer and (iii) NBF has itself sued Times asserting a contract and wishes to be allowed to continue those proceedings, which it does not suggest are for any relief other than pursuant to the contract, I consider that I would in any event be entitled to conclude that the jurisdictional hurdle for a contractual anti-suit injunction was met.

Issue 2: Strong Reasons?

81. The second focus of submissions was the question of what can constitute strong reasons, on the assumption that (as I have now concluded) a contractual analysis is applicable at least by analogy.

82. Here the issue relates to whether the concept can extend to prejudice to the Defendant which is not foreseeable – and specifically the question of time bar. This arose out of NBF's submission that one potential "strong reason" is where "*an anti-suit injunction will significantly prejudice the legal position of the injunction defendant, in a respect which is not a foreseeable consequence of the parties' bargain*": Raphael, at [8.15].

83. The argument derives from the authorities of *Toepfer International v Molino Boschi* [1996] 1 Lloyd's Rep 510, 512 (Mance J); *Verity Shipping v NV Norexa (The "Skier Star")* [2008] 1 Lloyd's Rep 652 at [51] (Teare J); and *Essar Shipping v Bank of China (The "Kishore")* [2016] 1 Lloyd's Rep 427 at [68] (Walker J).

84. NBF argues that:

    i) What these authorities demonstrate is that it may be the case that strong reason will be found if the injunction Defendant's substantive claims would be time-barred before the contractual forum and the injunction Defendant acted reasonably (or at the least not unreasonably) in not commencing in the contractual forum before the time-bar.

    ii) Here it is in just such a position – with a time bar against it which was the result of no negligence or unreasonableness on its part;

    iii) It is a relevant factor that the Court in Singapore would take a different view, granting a stay only on condition that the time

bar point was not taken. Reference was made to *OT Africa Line v Magic Sportswear* [2005] 2 Lloyd's Rep. 170.

85. Times points out that the concept is not a broad one. So strong reasons not to grant an injunction do not generally include: (i) the possibility or fact that an exclusive jurisdiction clause favouring the English Courts would be disregarded or considered ineffective in the foreign jurisdiction; (ii) the availability of damages: See *OT Africa* at [32] *per* Longmore LJ; *The Angelic Grace* at 96 *per* Millett LJ.

86. Times did not take issue with the existence of this potential sub-set of "strong grounds", on the basis of the authorities, but argued that they showed that reasonableness in missing the time bar was a necessary but not a sufficient condition and that the inquiry was fact sensitive. Accordingly, it focussed on whether it could really be applicable in this case.

87. The essence of the case was a *"two bites of the cherry"* approach, arguing that the only prejudice in the present case is the loss of multiplicity and inability to get a second bite at the cherry if the application under section 12 fails - and on the authority of *The Angelic Grace* that is not relevant prejudice.

Discussion

88. I accept the submission for Times that the fact that the Singapore Court might approach this matter differently is not legally relevant at this stage - in the sense of giving rise to "strong reason". This is a less acute situation than that in the *OT Africa* case, where it was clearly established that the Canadian Courts would ignore an exclusive jurisdiction clause, and where Longmore LJ nonetheless considered that this was not a strong reason against the grant of anti-suit relief. Further the difference of approach may be more apparent than real, in that even if the Singapore Proceedings continued, Times could arguably rely on the time-bar as a substantive defence at trial, arguing that the Singapore Proceedings were never a relevant "suit", relying on Article III Rule 6 substantively: *The Havhelt* [1993] 1 Lloyd's Rep. 523 at page 525 per Saville J; *The Alhani* [2018] 2 Lloyd's Rep. 563 at [124]-[126] per David Foxton QC – though the point is controversial: the contrary view was taken in *Compania Colombiana de Seguros v Pacific Steam Navigation Co.* [1965] 1 QB 101 at 126-7.

89. The heart of the matter as regards strong reasons is in the time-bar issue. Here I conclude that it is correct to say that the present case is not entirely on all fours with the cases to which I have referred above.

90. In *Toepfer*, which was a jurisdictional dispute, not primarily an anti-suit injunction case, Mance J refused the injunction because of delay - as he had already refused section 27 relief; and essentially for the same reasons – the applicant's decision to take its chances in another

forum for "*a substantial number of years*". The question of whether an injunction might otherwise be refused where the effect would be to result in a time-barred claim was academic.

91. *The Kishore* was another case where relief was refused on grounds of delay; Walker J dealt with the issues of prejudice *obiter* and briefly, against a background where the principles in this area were not disputed between the parties.

92. *The Skier Star* again was a case of an injunction being refused on grounds of delay where it was made some years into proceedings. The time bar issue was referred to at [49] only *obiter* and by reference to three earlier cases, which though eminent ones, did not concern anti-suit injunctions. Further it is clear that Teare J would not have seen that case as one of "not unreasonably"" missing a time bar in the light of what he had to say *obiter* (at [51]): *"any shipping lawyer would know that where a bill of lading purports to incorporate the terms of a charterparty including the law and arbitration clause it is, at the very least, prudent to obtain a copy of the charterparty"*.

93. Overall therefore I incline to the view that there is insufficient material in the authorities to support the view that in the context of "strong reasons" a time bar being missed reasonably/not unreasonably will necessarily be sufficient. There is clearly scope for argument about this, not least because, given the existence of section 12, the alternative view would have the capacity to undermine the rigour encapsulated in the section.

94. That alone raises doubts about whether this case could be an appropriate case for the application of this category of strong reason. Further while I would have no difficulty in concluding that the requirement that the time bar be missed "not unreasonably" was met in the circumstances of this case, one still cannot quite say that this case falls within the limited boundary indicated by the authorities. In particular there is, as yet, no established time-bar - with the section 12 application outstanding, that is a matter which has not yet been established, and there is a potential mechanism for relief via that application.

95. It is therefore true to say that when one considers prejudice the position at the moment is that, with or without relief, NBF's section 12 application will be heard by this Court and it will be open to NBF to raise similar arguments to those it has made before me, in particular as to whether the conduct of Times makes it unjust to allow it the benefit of the time-bar. It might therefore be argued that whether or not it is unjust for NBF to be subject to the time-bar will therefore be resolved on that Counterclaim and that this argument puts the cart before the horse.

96. It is also logically correct that NBF only needs to rely on the Singapore Proceedings if it fails under section 12; and that this amounts to saying that even if this Court refuses, on established principles, to grant an extension under section 12, NBF would still be "*unjustly subject to an arguable time bar defence*". Or to put it a different way, that the Singapore Proceedings are wanted only as a backstop, in case this Court says that this is not a case for section 12 relief.

97. All of these factors point to the conclusion that despite the background, and the fact that NBF's approach was not unreasonable, this is not a case where it can be said that there is "strong reason" for not granting an anti-suit injunction because of the time bar issue.

Other discretionary factors

98. Yet this is not the end of the consideration, because the grant of injunctive relief is discretionary, and I consider that there are a number of relevant discretionary factors in play - including the considerations as to the missing of the time bar, though they do not meet the hurdle of "strong reason".

99. I deal first with the "flip side" of the arguments deployed by Times in relation to "strong reason". Times' position is one based on objecting to duplicity/second bite of the cherry. That point has force; however, there is at the same time a considerable degree of irony in this submission, given that Times is not accepting the validity of the points which would lead to duplicity. Thus in order to say that NBF is not quite within the ambit of the authorities on reasonably missed time bars, it relies on the fact that there is a section 12 application outstanding. Yet relief under section 12 is granted on a different juridical basis, is not a foregone conclusion - and it is plain that there is a positive intention on the part of Times to oppose that application for relief.

100. Similarly while it is also true that, whatever happens in the Singapore Proceedings, NBF will still have its two fall-back arguments that (a) its Notice of Arbitration was already effective to commence arbitration against Times, and (b) the time-bar does not apply to misdelivery claims, it is uncomfortable that Times should be able to rely on these points as arguments against the grant of relief, where it is clear that Times will oppose both of these fall-back arguments.

101. So the reliance on duplicity by Times takes place in a context where Times is itself committed to knocking out these other props by other means.

102. Secondly it is clear that separate discretionary factors are relevant. The concept of "strong reasons" for not granting an anti-suit injunction relates primarily to justifications for suing in the foreign

court. As Phillips J put it in *ADM Asia-Pacific Trading Pte Ltd v PT Budi Semesta Satria* [2016] EWHC 1427 (Comm) at [34]:

> "It does not subsume or exclude issues relating to delay on the part of the applicant or other general discretionary considerations which may arise on any application for equitable relief, even where an entitlement to such relief would otherwise have been established".

103. Here three points come into focus. The first is the "different approach" point to which I have already referred, in other words the fact that Times had not sought or agreed to a stay in Singapore because such a stay would be on terms that no time bar issue was taken. That may not constitute "strong reason" for not granting an anti-suit injunction, but given the essence of the relief which such a step would have given in relation to duplicity, it links to the points which I have just made. If Times says that NBF wants two bites of the cherry, NBF might equally say that Times wants to eat its cake and have it too.

104. The second point which comes into focus is the issue of delay, which is always an important question in this area - and was one reason why Andrew Baker J ordered this matter to come back on notice. An applicant for anti-suit relief must act "*promptly and before the foreign proceedings are too far advanced*": see *The Angelic Grace* at page 96.

105. The approach to this question was summarised by Bryan J in *Qingdao Huiquan Shipping v SDHX* at [29]:

    i) There is no rule as to what will constitute excessive delay in absolute terms. The Court will need to assess all the facts of the particular case.

    ii) The question of delay and the question of comity are linked. The touchstone is likely to be the extent to which delay in applying for anti-suit relief has materially increased the perceived interference with the process of the foreign Court or led to a waste of its time or resources.

    iii) In considering whether there has been unacceptable delay a relevant consideration is the time at which the applicant's legal rights had become sufficiently clear to justify applying for anti-suit relief.

106. Here NBF says there has been considerable delay - from November 2019 to March 2020 - over a quarter of a year. While Times submits that there has been no real delay in applying for this relief, I am not persuaded that this is correct, bearing in mind the relatively strict approach seen in the authorities.

107. Times says that between 9 November 2019 and 25 February 2020, the parties corresponded on the apparent footing that the Singapore Proceedings would be stayed by consent, such that no anti-suit relief was required (and would have been redundant). There were no pleadings and it was legitimate to see what NBF intended to do. Essentially the submission is that it would be premature to apply earlier if it was going to become clear that the matter could be dealt with by consent.

108. On this basis Times submits that the earliest date which can be counted against it is when NBF first indicated that it would require waiver of the time bar as a condition of staying the Singapore Proceedings - on 25 February 2020.

109. However, this submission appears to fly in the face of the decision of Phillips J in the *ADM* case already cited. In that case it was submitted that waiting for a challenge to jurisdiction should not be regarded as culpable delay. Following a detailed survey of the authorities he rejected that submission. While delay pending attempts to resolve foreign proceedings consensually was not specifically dealt with, the approach indicated there and in the authorities considered by him makes it clear that such matters as expense, and the raising of false expectations can be a factor.

110. Here there is a considerable period where correspondence appears to have been fairly desultory, and where the onus was on Times to bottom out the position or apply. I am not persuaded that it would be right to say that the 25 February is the appropriate date. Even after 25 February it cannot be said that the application was made entirely promptly – with a further PTC occurring in the Singapore Proceedings. The result has been a waste of time and costs, and a waste of resources of the Singapore Court.

111. Thus while this is not a case of egregious delay, such that I would be minded to refuse the injunction on this ground alone, there are elements of delay which form a discretionary factor which feeds in to the consideration.

112. Thirdly of course there is the element of “unclean hands”. While plainly this is a consideration which can feed into the discretionary element, I am minded to be cautious about the amount of weight to be given to this factor in this context, given (i) the fact that it is a specific focus of the section 12 enquiry (ii) that it has not itself been a central focus of the submissions before me and (iii) that the commercial focus of this case now lies not with Times or even Rosalind but Trafigura. I would not therefore be minded to give it very much weight above what comes into play from the conclusion arrived at in relation to the “strong reason” argument, that the missing of the critical date by NBF does not appear to have been unreasonable. The unclean hands element here is more or less the reverse face of that

argument. However even with Trafigura being the commercial focus, I still consider it is appropriate to give it some weight, to the extent that all three of Times, Rosalind and Trafigura seem likely to have been aware of what NBF's understanding was.

Conclusion

113. Ultimately I have formed the view that while the jurisdictional basis for an injunction is made out, there are discretionary factors which, while being insufficient to persuade me that there should be no injunctive relief at all, do militate against the grant of an injunction in the terms sought.

114. Bearing in mind the nature of those factors, I have concluded that the grant of an injunction would only be just and convenient if it were on conditional terms - that condition being as to Times giving an undertaking not to rely on any time bar argument in the London arbitration.

115. This is an approach which has been adopted in a number of cases, such as *Tracomin v Sudan Oil Seeds* [1983] 1 WLR 1037. A similar approach has been taken where the effect of the injunction would be to cause the defendant to lose security (which is not suggested to be the case here). While such cases turn on their own facts and do not provide any general guide, they do indicate that this is a suitable approach in an appropriate case.

116. Weighing the various factors relevant to the exercise of the discretion I do conclude that the justice of this case is best met by the imposition of such a condition.