Neutral Citation Number: [2020] EWHC 2198 (Comm)

Case No: CL-2020-000036

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

The Rolls Building, 7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 22/05/2020

Before:

MR JUSTICE WAKSMAN

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Between:

RUBY TREE SHIPPING SA	**Claimant**
- and -	
(1) GENERAL MOTORS DO BRASIL LTDA **(2) STARR INTERNATIONAL BRASIL SEGURADORA SA**	**Defendants**

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MR JAMES LEABEATER QC (instructed by **Stephenson Harwood**) for the **Claimant**
The Defendants did not attend and were not represented

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APPROVED JUDGMENT

(The hearing was conducted remotely)

MR JUSTICE WAKSMAN :

1. This is an application for judgment in default for an anti-suit injunction and declaratory relief The bill of lading states that the shipper is Komatsu, that the consignee is the first defendant, and that the vessel is Thorco. That bill was issued on 23rd February 2018. The short point so far as the underlying claim is concerned is that the first defendant has complained that in the course of the voyage the machinery was damaged in such a way that it gives rise to a claim which has been put at something like $2 million.

2. There was a letter of claim from Holman Fenwick who have been representing the defendants at least in terms of correspondence, although they have never come on the record so far as these proceedings are concerned. The claimant says that there is nothing in the claim substantively because as the provisions of the bill of lading make clear, the only party against whom a claim can be made in relation to the carriage of the goods is the carrier, Danmar, and not the claimant, the owner of the vessel.

3. The merchant is defined in the bill of lading to include the consignee and the services refer to the loading and carriage of the goods. The subcontractor includes the owner and the charterer of the vessel, so that would include the claimant. By paragraph 7.3, the merchant undertakes that no claim will be brought against any agent of the carrier or subcontractor but if they do, then the merchant would agree to indemnify and hold harmless the carrier. 7.4 says that without prejudice to 7.3 all the agents and subcontractors shall be entitled to all defences, exemptions, immunities and so on, including the right to enforce any law and jurisdiction clause, which is important here. 7.5 provides is a general undertaking that no claim will be made against the carrier other than in accordance with this bill of lading. There is a time limit of nine months under clause 8.7.5(b).

4. The law and jurisdiction clause is clause 14 which says that any claim against the carrier in relation to goods shall be determined exclusively by the courts of England and that there will be no instigation of legal proceedings in any other courts and will indemnity the carrier for all legal costs incurred by the carrier to stay or remove filing anywhere else. Clause 15 says that where 14.1 applies, the subcontractors (that is the claimant here), shall have the benefit of 2.4 and all the liability provisions and so on; but what it also means is that if, as has happened here, there is a threat or an intention to bring proceedings not in the English courts, then this claimant along with the carrier has the right to invoke the law and jurisdiction clause here for the purpose of any application for an anti-suit injunction.

5. In the course of correspondence the defendants pointed to one particular clause, which is 8.1.2, to the effect that in the case of non-US carriage any international convention or national law applies to any element of the services, in which case the liability of the carrier in relation to that element will be determined in accordance with that provision. That has been invoked to suggest in some way that English law is displaced. That is misconceived.

6. It is frequently the case that some other treaty or convention may be incorporated to deal with some aspect of the carriage but that does not mean that the underlying governing law is displaced. It still remains English law; it just means that for one bit there is a foreign provision there. There is a Brazilian provision which is relied upon which may raise strict liability or matters of that kind; but this would still be subject to the overarching governing law and in any event, of course, that particular provision cannot deal with the question of jurisdiction, which is what matters here.

7. So although there had been some correspondence batting backwards and forwards, what the claimant then did (because the matter was not resolved) was to issue these particulars of claim, which included the material parts of the bill of lading and which in their original

form sought three declarations: the first was that the Danmar bill is governed by English law, the second that there was no liability to the defendants because that would fall foul of clause 7.3, and third there is a time bar which now applies and that there is an indemnity clause in relation to the costs they have been put to.

8. The particulars of claim were issued and by an order made by Mr Justice Bryan on 4th February they were permitted to be served out of the jurisdiction and to serve by particular means which includes emails to Holman Fenwick and, indeed, directly to the defendants. All that has been done. Therefore, the service provisions have been complied with, the service out is proper. Notwithstanding that, there has been no acknowledgement of service of any kind and no challenge to the jurisdiction.

9. What has happened is that the defendants have taken the decision, which can only have been deliberate, not to engage in these proceedings at all; while there was some correspondence with Holman Fenwick, they made it clear they were not authorised to deal with the question of service and they had no instructions to respond, which I think fairly can be described as meaning that they did have instructions not to respond. So there has been a deliberate non-engagement on the part of the defendants. There has been no filing of an acknowledgement of service which means that the claimant is entitled to judgment in default.

10. I have got to be satisfied it is appropriate to grant declaratory relief. I am, here, because the defendants are blowing hot and cold. They are making a claim but they are not engaging in the proceedings even if just to contest jurisdiction. There is an issue between the parties because the defendants, although for reasons which are misconceived in any event, consider that they do have a claim against the claimant, whereas they do not and

therefore it is entirely right that that should be reflected and therefore I will grant those three declarations.

11. The position so far as proceedings in Brazil is concerned is that some steps have been taken in that the defendants have applied to the Brazilian court to stop the running of time, although there has not actually been any formal issue of proceedings in Brazil; it is right to say that the correspondence has focused upon the seeking of security which if all other things are equal, one can seek security from a foreign court without being subject to an anti-suit injunction. The difficulty for the defendants here is that there is no underlying cause of action against this claimant.

12. When they were invited, having said that, for example, a claim in Brazil would now be time barred, therefore to undertake not to issue proceedings in Brazil, they simply refused to do so. So they are, in my judgment, simply blowing hot and cold about all of this and there can be no confidence that they will not seek to institute proceedings in Brazil. If they do, that flies in the face of the terms of the jurisdiction clause which I have read out and they would be in breach of their contractual obligation, of which the claimant can take advantage, not to sue anywhere other than in English jurisdiction. In those circumstances there is an incontestable case for an anti-suit injunction which I shall grant.