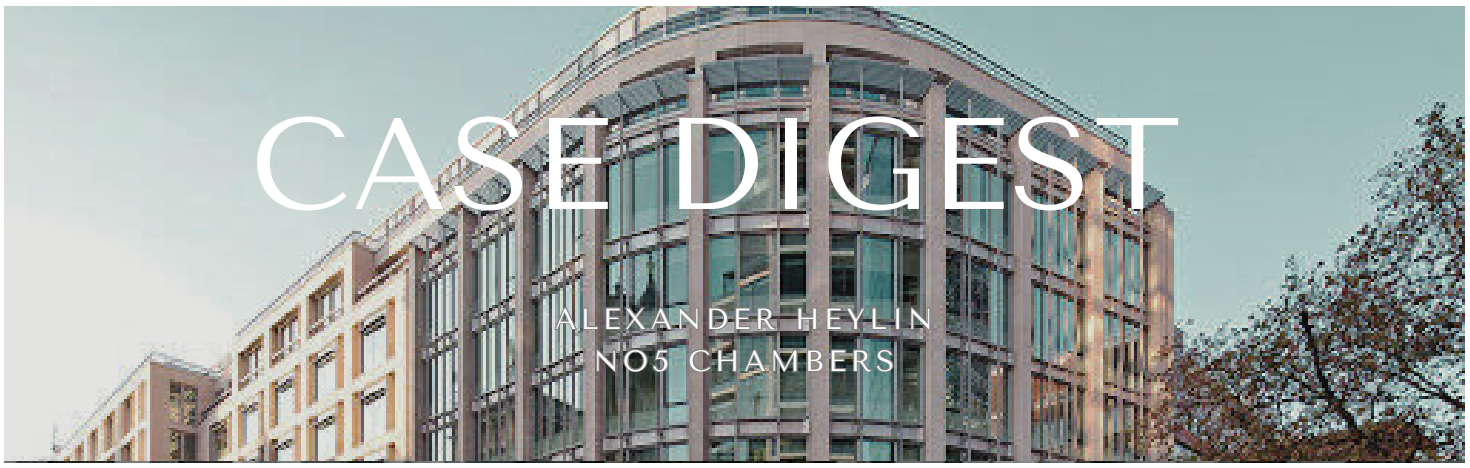

MARSH LTD V GREENSILL BANK AG

[2024] EWHC 3068 (Comm)

KEY TAKEAWAYS:

1. Clarified that the 'high degree of probability' threshold for interim anti-suit injunctions will usually mean something close to the standard set by the summary judgment test.
2. Confirmed the role of proportionality in determining whether a party's breach of its duty of full and frank disclosure is sufficient to set aside an interim anti-suit injunction.
3. It was in the interests of justice to allow the interim anti-suit injunction to continue on a more limited basis to restrain Greensill Bank AG from taking any steps to bring a claim against Marsh Ltd in Australia.

ISSUE

Whether an interim anti-suit injunction restraining the Defendant from bringing foreign proceedings against the Claimant should be set aside.

FACTUAL BACKGROUND

Marsh Ltd provided insurance booking and other services to Greensill Capital (UK) Ltd (GCUK) and its sister company, and later subsidiary, Greensill Bank AG (GBAG). This occurred under a series of Letters of Engagement, addressed to GCUK and signed by an officer of GCUK, incorporating standard form Terms of Engagement (containing the clauses seen to the right). There was also a separate Letter of Engagement concluded by GBAG with Marsh Ltd, which was materially identical to the other Letters of Engagement concluded, save as regards remuneration.

Following the collapse of the Greensill Group, GBAG communicated their intention to join Marsh Ltd to the proceedings before the Federal Court of Australia. Marsh Ltd, considering that GBAG was bound by exclusive jurisdiction clauses and fearing that this would expose it to liability not covered by the contractual limitation, decided that the right course was to obtain an interim anti-suit injunction from the English court.

TERMS OF ENGAGEMENT

Limitation of Liability Clause

Capped Marsh Ltd's liability for insurance booking services at £7.5 million (later increased to £10 million).

Governing Law and Jurisdiction Clause

"The Engagement and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with English law and any disputes related thereto shall be subject to the exclusive jurisdiction of the English courts."

Affiliates Clause

"You accept the Engagement on your own behalf and on behalf of each of your affiliates (where they are receiving, or are a beneficiary of the Services). You shall ensure that each of your affiliates will act on the basis that they are a party to and bound by the Engagement..."

MARSH LTD'S WITHOUT NOTICE APPLICATION FOR AN INTERIM ANTI-SUIT INJUNCTION

Due to concerns that giving full notice to GBAG may result in GBAG obtaining an anti-anti-suit injunction from the Australian court first, Marsh Ltd decided to seek one on very short notice to GBAG. Marsh Ltd was aware that, as a result, it would have the duties of full and frank disclosure.

In order to comply with what were understood to be Marsh Ltd's duties, in preparation for the interim application, Marsh Ltd's lawyers reviewed over 14,000 documents, including documents which had been disclosed to Marsh by GBAG in the Australian proceedings.

Following the without notice application, Cockerill J granted the interim anti-suit injunction in favour of Marsh Ltd, restraining GBAG from taking any steps to initiate or bring a claim against Marsh in Australia.

GBAG'S APPLICATION IN AUSTRALIAN PROCEEDINGS IN RELATION TO MARSH LTD'S BREACH OF THE HARMAN OBLIGATION

After the interim anti-suit injunction had been granted, GBAG brought an application in the Australian proceedings contending that, in obtaining the without notice interim anti-suit injunction, Marsh Ltd had breached the obligation not to make collateral use of documents disclosed in those proceedings. In other words, Marsh Ltd breached the 'implied undertaking' known as the Harman obligation.

Following a hearing, Moshinsky J, sitting in the Federal Court of Australia, concluded that Marsh Ltd's lawyers had breached the Harman obligation 'beyond reasonable doubt', constituting a contempt of the Australian court.

However, Moshinsky J went on to order that, from the date of his order, Marsh Ltd's lawyers be released from the Harman obligation In relation to documents disclosed by GBAG to Marsh Ltd in the Australian proceedings, such that those documents may be used for the purpose of the anti-suit injunction application.

PARTIES' AGREED SUMMARY OF LAW APPLICABLE TO ANTI-SUIT INJUNCTIONS

(as set out in paragraph 22 of Mr Simon Colton KC's judgment)

QBE Europe SA/NV v Generali Espana de Seguros y Reaseguros [2022] EWHC 2062 (Comm)

(Foxton J at [10]):

(i) The court's power to grant an ASI to restrain foreign proceeedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration, is derived from section 37(1) of the Senior Courts Act 1981, and it will do so when it is 'JUST AND CONVENIENT'.

(ii) The touchstone is WHAT THE ENDS OF JUSTICE REQUIRE.

(iii) The jurisdiction to grant an ASI should be EXERCISED WITH CAUTION.

(iv) The injunction applicant must establish with a 'HIGH DEGREE OF PROBABILITY' that there is an arbitration or jurisdiction agreement which governs the dispute in question.

(v) The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show STRONG REASONS to refuse the relief (relying on Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Ll Rep 87).

(vi) The DEFENDANT BEARS THE BURDEN of proving there are strong reasons.

DEFENDANT'S GROUNDS OF OPPOSITION TO CONTINUATION OF THE ANTI-SUIT INJUNCTION

1.
Claimant was in breach of obligation of full and frank disclosure at the without notice hearing.

2.
In the alternative, the Claimant has not satisfied 'high degree of probability' threshold.

3.
There are, in any event, 'strong reasons' for not restraining the Defendant's intended claim in Australia.

ISSUE 2: 'HIGH DEGREE OF PROBABILITY'

Mr Simon Colton KC recognised that there appeared to be scant authority as to what the 'high degree of probability' threshold actually means and found it difficult to reconcile the existing authorities on 'high degree of probability' and 'high degree of assurance'.
He reminded himself of the statutory requirement that an anti-suit injunction be 'just and convenient' and that 'the touchstone is what the ends of justice require'.

Mr Simon Colton KC accepted that, although it is not a hard and fast rule, 'a high degree of probability' in the context of an application for an interim anti-suit injunction will usually mean something close to the standard set by the SUMMARY JUDGMENT TEST:

'The court should not usually proceed to determine the matter in the claimant's favour unless the court considers that the defendant would have NO REAL PROSPECT of defeating the application at trial.'

ISSUE 1: FULL AND FRANK DISCLOSURE

Marsh Ltd conceded that there was a breach of the duty of full and frank disclosure, and Mr Simon Colton KC found that the failure to disclose Marsh Ltd's contempt of the court in using Harman documents was a serious and substantial breach of Marsh Ltd's duties to the English court.

Overall, Mr Simon Colton KC considered that the features of the case warranted the exercise of his discretion not to set aside the interim anti-suit injunction, but rather to consider on the merits the substantive questions relating to its continuation.

Despite recognising that such a discretion is to be exercised sparingly where there has been a significant breach, Mr Simon Colton KC found that NOT SETTING ASIDE THE INTERIM ANTI-SUIT INJUNCTION WAS WHERE THE INTERESTS OF JUSTICE LAY IN THIS CASE as:

- With the exception of the issue in question, Marsh Ltd demonstrated care in seeking to fulfil their duties of full and frank disclosure;
- Marsh Ltd had shown appropriate contrition and apologised for their admitted breach; and
- The outcome sought by GBAG was disproportionate to the breach in question.

This test should be adopted because of the TWIN RATIONALES for the test in this context:

1. Interim anti-suit injunctions tend to be DETERMINATIVE of the question in issue

2. Interim anti-suit injunctions do not merely interfere with the private rights of the respondent, but may INTERFERE, albeit indirectly, WITH THE WORKING OUTPUT OF A FOREIGN COUNTRY, raising issues of COMITY.

In reaching that conclusion, Mr Simon Colton KC held that the court should have regard to EVIDENCE THAT CAN (OR COULD) REASONABLY BE EXPECTED TO BE AVAILABLE AT TRIAL.

ISSUE 2: 'HIGH DEGREE OF PROBABILITY' CTD.

'HOLDING THE RING'

Mr Simon Colton KC considered a way in which the courts have dealt with applications where the case for an interim anti-suit injunction meets the threshold of a 'good arguable case', but does not meet the 'high degree of probability threshold'.

This is where the courts have given directions for the trial of the issue, and continued the interim anti-suit injunction to 'HOLD THE RING' until the trial takes place.

Overall, he did not consider that this was a case where he could or should grant an injunction to 'hold the ring' pending trial, applying some lower threshold than the 'high degree of probability' threshold.

In this case, the 'high degree of probability' threshold applied, due to the twin rationales underlying it applying in the circumstances.

THE AUTHORITY ISSUE

The general principles in respect of authority are undisputed and summarised in The Law Debenture Corps plc v Ukraine [2023] UKSC 11 at [38]-[42],

Mr Simon Colton KC was not satisfied to a 'high degree of probability' that GCUK had the actual or ostensible authority to bind GBAG to the GCUK Letters of Engagement.

On the contrary, without making any finding, he found it to be more likely than not that GCUK did not have such authority and would fail to make good its case at trial.

ISSUE 3: 'STRONG REASONS'

In light of the decision in respect of issue 2, it was recognised that there was only one relevant Letter of Engagement in respect of which an interim anti-suit injunction might be granted. This Letter of Engagement was between GBAG and Marsh Ltd and the court considered whether there were strong reasons not to grant an interim anti-suit injunction

Mr Simon Colton KC was UNPERSUADED by GBAG's arguments in relation to 'strong reasons' as:

- A multiplicity of proceedings in different jurisdictions already existed;
- No third parties were affected;
- GBAG would suffer no real injustice from having to bring its claim in England;
- Protecting parties from exposure to substantial civil claims in foreign jurisdictions is a major reason why commercial parties conducting business internationally use exclusive jurisdiction clauses;
- Moshinsky J took the decision that it was appropriate to release Marsh Ltd from the Harman obligation and it would, therefore, be disproportionate to deny Marsh Ltd the benefit of the exclusive jurisdiction clause as a result of its breach of that obligation; and
- It being challenging for GBAG to formulate a claim against Marsh Ltd in the Australian proceedings was a predictable inconvenience for GBAG, nothing more.

CONCLUSION

As a result of Mr Simon Kolton KC's conclusions in respect of the three issues considered above, the interim anti-suit injunction was ALLOWED TO CONTINUE on a more limited basis to restrain GBAG from taking any steps to initiate or bring any claim against Marsh Ltd in Australia, in relation to the relevant Letter of Engagement and any non-contractual obligations arising out of or in connection with it.

ALEXANDER'S PRACTICE ENCOMPASSES INSOLVENCY AND COMMERCIAL CHANCERY. THIS INCLUDES CONSIDERABLE CROSS-BORDER AND OFFSHORE EXPERIENCE.

IF WE CAN ASSIST FURTHER, PLEASE FEEL FREE TO CONTACT -

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