Kallang Shipping SA v Axa Assurances Senegal [2006] APP.L.R. 11/07

JUDGMENT : Mrs. Justice Gloster : Commercial Court. 7th November 2006.

1. This is an application by the Defendants to set aside an order made by Cooke J. on 16th March 2005 by which he ordered that the Defendants should be prohibited from continuing, instigating or commencing proceedings against the Claimants under certain bills of lading issued in respect of cargo loaded on to the vessel 'Kallang' in any jurisdiction other than before a London Arbitration Tribunal. He also made orders for service out of the jurisdiction. The Defendants also apply to set aside these orders and for declarations that the Court has no jurisdiction over the Defendants. The Claimants' position, on the other hand, is that the anti-suit injunction should be continued pending trial.

2. These applications came before me in late June 2006 but, as a result of the way in which the Claimant's arguments, in particular, developed during the course of the hearing, further lengthy submissions were served by both sides after the hearing. I am indebted to counsel and solicitors for the further written submissions.

3. Briefly summarised, the facts are as follows. The Claimant, Kallang Shipping SA, was, at the relevant time, the owner of the vessel, Kallang. The Second Defendant, Comptoir Commercial Mandiaye Ndiaye ("CCMN"), was the ultimate receiver of cargo carried on board the vessel and discharged at Dakar from 3rd March 2005. The First Defendant, Axa Assurance Senegal ("Axa Senegal"), was the underwriter of the cargo. The Third Defendant, Axa France Assurance SA ("Axa France") is a company in the well-known group of French insurance companies. The Claimant contends that Axa France was, if not the parent company of Axa Senegal, at least in the same group of companies, and was directing and controlling Axa Senegal's conduct of the matters relevant to this litigation.

4. Fourteen bills of lading, which incorporated a charter party containing an English Law and London Arbitration clause, were issued in respect of the cargo. During discharge of the cargo, allegations were made by CCMN to the effect that some 3,000 bags of cargo were missing. The merit of these allegations is disputed by the Claimant, who says that, in reality, a much smaller number of bags were damaged or missing, and that, of these, most were damaged by handlers during discharge.

5. By a fax dated 8th March 2005, Axa Senegal, acting as underwriters for CCMN, demanded from the Claimant's Dakar lawyers a provisional guarantee in the maximum amount of FCFA 30,500,000, equivalent to Euros 46,496.95, to be replaced by a bank guarantee when final figures had been established on completion of discharge. By an e-mail dated 10th March 2005, this request was maintained, together with an assertion that the arbitration clause in the charter party did not apply because it was contended that Axa Senegal was not a party to that contract.

6. The Claimants' P & I Club, American Protection and Indemnity Club ("the American Club") refused Axa Senegal's demands for a guarantee. However, the American Club indicated, through Messrs. Jackson Parton, solicitors, on 10th March 2005, that it would put up a letter of undertaking on usual Club terms as security for the full sum claimed, subject to English Law and London arbitration being agreed. The letter also stated that, in the event that Axa Senegal refused to accept a Club letter answerable to English law and arbitration and decided to arrest the vessel, the solicitors were instructed to apply to the English High Court for an anti-suit injunction without further notice. No response was received to this offer. Instead, on 11th March 2005 (the next day) CCMN made an application to the President of the Tribunal Regional Hors Classe of Dakar ("the Dakar Court") for payment of the sum of FCFA 25,000,000, failing which the vessel was to be arrested.

7. It is necessary to examine the precise terms of the application to the Dakar Court. CCMN, by its Senegalese lawyers, Maitres Ba & Tandian, presented the Court with a composite document setting out both the application and the draft order. At least, that is the Claimants' contention and it appears to be supported by the document itself. The claim itself contained the following paragraphs:

   "Que sa créance étant menacée de péril du fait du départ imminent du navire, prévu à la fin des opérations de déchargement, le vendredi 11 mars 2005, en fin de matinée, la requérante éprouve le plus grand intérêt à faire procéder à la saisie conservatoire du navire, pour avoir sûreté et paiement de celle-ci qu'il vous plaira d'évaluer provisoirement à la somme de 25.000.000 F CFA, sans nul préjudice des frais et intérêts de droit.

   Que l'expert prévoyant en outre une possible aggravation du préjudice, la requérante ne manquera pas, le cas échéant, de vous saisir pour voir ordonner toute mesure complémentaire utile de nature à sécuriser sa créance"

   The translation of these two paragraphs was as follows

   "Given that the claim was being put at risk by the imminent departure of the ship which was due to depart after unloading operations had been completed on Friday, 11th March 2005, late morning, the Applicant felt it was in its best interests to request the arrest of the ship as a guarantee and payment [my emphasis] of the amount estimated at 25 million CFA francs without prejudice to the expenses and interest applicable by law

   Given that the assessor envisaged a possible increase in the amount of damage suffered, the applicant would, if appropriate, apply to you to request the issue of any additional measure necessary to secure [my emphasis] the amount claimed".

8. The order, however, made by the Judge, the President of the Dakar Court, is in the following terms:

   ***"Y faisant droit**, autorisons la société Comptoir Commercial Mandiaye NDIAYE à faire procéder à la saisie conservatoire due navire <> jusqu'à la mise en place d'une caution bancaire et ce, pour avoir sûreté du paiement de*

sa créance que nous évaluons provisoirement et sans nul préjudice aux frais et intérêts à la somme de 25.000.000 F CFA.

***Ordonnons** à la requérante d'introduire l'action en vue de l'obtention d'un titre exécutoire dans le délai d'un mois à compter de la saisie, conformément à la loi (article 61 OHADA sur les procédures simplifiées de recouvrement)."*

The somewhat rough translation of these two paragraphs which was provided to the Court was in the following terms:

"According to the request, I authorised the company [CCMN] to proceed with conservatory arrest of the ship, Kallang, until the putting in place of a bank guarantee, and this, for the purpose of having security for payment [my emphasis] of its claim that we estimate without prejudice to any expenses and interest at the sum of 25,000,000 CFA francs.

I order the Applicant to take action to obtain an execution order within one month from the date of the arrest in accordance with the law, Article 61 OHADA on the summary procedures for debt recovery".

9. The official notification and report of the arrest was apparently compiled by the huissier (bailiff), although the Claimant submits that it is at least arguable that the documents may well have been typed up in advance by CCMN's lawyers, finalised by them, as far as they could, once they had the order and presented to the huissier for completion during the course of the arrest. It is not possible, in my judgment, to resolve these kind of factual issues on what is essentially an interlocutory application. However, I accept the submission from Mr. Layton QC, on behalf of the Claimants, that there is an arguable case to that effect. The point is that these documents suggest that what the Claimant was looking for was not simply security, but also actual payment. The official report of the request is in the following terms:

"De, immédiatement et sans délai, payer entre les mains de moi huissier porteur des pièces et ayant pouvoir de donner bonne et valable quittance la somme de 25.000.000 F CFA, laquelle répresente la créance de ma requérante, ainsi qu'exposé à travers la requête suivie de l'ordonnance.

Leur déclarant que faute par eux de se faire, il sera procédé à la saisie conservatoire de leurs biens meubles corporels.

Le paiement n'ayant pas été effectué, j'ai, conformément à l'Acte Uniforme portant organisations de procédures simplifiés de recouvrement et des voies d'exécution OHADA, dit et déclaré au requis, in la personne du commandant du navire, qu'ils sont tenus d'indiquer les biens qui auraient fait l'objet d'une saisie antérieure et de communiquer le procès-verbal de cette saisie."

This was translated as follows:

" Having notified the owner of the aforementioned ship, represented by the ship's captain…

To immediately, and without delay, to pay directly to me a bailiff, having power to issue a good and valid receipt, the sum of 25,000,000 FCFA, which represents the applicant's claim, as set out in the petition followed by the Order.

I informed them that if this was not done , a seizure of their assets would be carried out

Since the payment had not been made. . .".

10. Upon the evidence before me it was certainly arguable that the payment of the sum demanded to the huissier would amount to recognition of the merits of the claim under Senegalese law, and that any sums so paid are deemed to be final and binding and are non-recoverable. That appears from the expert report of Madame Genevieve Lenoble, the Claimant's expert, dated 20 June 2005, at paragraphs 3.14 and 3.3 and her other evidence. She also expressed the opinion that the order for payment included in the notification of arrest was unusual, since the amount had not been ascertained at a fixed amount and was not enforceable, and such demand extended beyond what was in the Judge's order. Although some attack was made on her independence on the basis that she had acted for the Claimant, or associated companies of the Claimant on previous occasions, I had no reason to suppose, for the purposes of these proceedings, that her evidence was in any way tainted by any connection. Although her evidence on these points was not agreed to by the Defendant's expert, Professor Martin Ndende, it was sufficiently compelling for the purposes of these interlocutory proceedings to provide the basis of a reasonably arguable case to the effect that, whatever the terms of the actual court order, the report of the arrest certainly suggested that actual payment was being sought by those proceedings.

11. After the ship had been arrested, there was further communication between Axa Senegal acting, as Mr. Dia of Axa Senegal accepts, for CCMN, and Messrs. Jackson Parton, acting for the owners and the American Club. It is clear that, certainly so far as the Claimant's evidence is concerned, the Defendants remained unwilling to accept a letter from the American Club in standard Club terms. On 14th March it appears that Mr. Dia said that a firm decision had been taken not to accept a letter of undertaking from the American Club, although the American Club then issued a letter of undertaking and delivered it to Jackson Parton to hold to the cargo claimants' disposal. Suggestions were made by the Defendants that they were unwilling to accept a letter of undertaking from the American Club because of alleged doubts about its financial viability. However, it is a matter of note that, at a later hearing before Cooke J on 23rd March 2005, counsel for the Defendants, Mr. Dominic Happe, unsurprisingly given the amount of the cargo claim, did not seek to argue that a Club letter from the American Club was inadequate security.

12. I should also refer to the statement of Mme. Caroline Latinier who was the P & I representative acting for the Claimant in Senegal. Her witness statement, or certificate to be precise, states that she was in contact with Mr. Dia several times, either by e-mail or on the telephone, in an attempt amicably to negotiate the matter on behalf of the Claimant. She states that, during their numerous exchanges, Mr. Dia confirmed: *"Since arrest of the vessel until release, only a bank guarantee including exclusively Senegalese jurisdiction was acceptable to his company to release the vessel. We proposed him the competent and the English jurisdiction, but he refused each time. We also asked him to confirm all our phone exchanges by e-mail or fax in English, but he also refused on the ground he could not deal with English language. Facing numerous refusals we tried to speak with the manager of Axa Assurance Senegal . . .".*

She then deposes as to difficulties in getting in touch with him. That gentleman was called Mr. Diagne. She goes on to say: *"We understand that during the first week of arrest of MV Kallang from March 11th 2005 to March 18th 2005, Mr. Diagne was in France visiting Axa's Paris office, and he also refused categorically to take into consideration competent or English jurisdictions proposal in the guarantee matter. We also proposed to him on behalf of our clients to accept a single letter of undertaking, rather than a bank guarantee, but one more time faced his refusal".*

13. This stance is borne out by the faxes and e-mails, which have been exhibited in the evidence, which show that, certainly during the course of correspondence, CCMN and Axa Senegal were insisting on a bank guarantee which would have involved, in reality, a Senegalese jurisdiction not only for the resolution of any claim under the guarantee, but also for the determination of the dispute relating to the cargo.

14. In the event the Claimant made the application to Cooke J. for an injunction on 16 March 2005. The terms of the injunction, which he granted, I have already summarised, but I should set them out in detail. The actual wording of the order, paragraph 1, was as follows: *"Upon the provision of a letter of undertaking by fax to the Second Defendants in the form initialled by the Judge, the Defendants whether by themselves, their servants, agents, or officers shall not commence, continue or instigate any proceedings, including in particular the proceedings currently before the court in Dakar, Senegal, in respect of claims which arise under or relating to the Bills of Lading listed in schedule 3 hereto otherwise than before a London arbitration tribunal under the terms of the Bills of Lading, and shall discontinue the said proceedings in Dakar and procure the release of the vessel KALLANG which has been arrested in such proceedings."*

15. However, at a subsequent on-notice hearing on 23rd March 2005, at which, the Claimant sought permission to serve the application on the Third Defendant, Axa France, the parties, were able to agree the terms of a Club undertaking. CCMN subsequently secured the release of the vessel. The order which was made on 23rd March 2005 recited not only the Claimant's undertaking to hold to the order of CCMN and to deliver to it on demand the original of the Club letter of 23rd March 2005, but also recorded an undertaking by the American Club in the following terms: *"Undertaking that if the Claimants Kallang Shipping SA are found not to be entitled to restrain the Second Defendants' reliance on the order of the President of the Tribunal Regional Hors Classe de Dakar in Senegal dated 11th March 2005, then it will either make a cash payment as directed by that order, or procure a bank guarantee in Senegal in favour of the Second Defendant, as provided by that order".*

The order then went on to recite an undertaking by CCMN to forthwith secure the release of the vessel.

16. It is relevant to note that the terms of the Club's undertaking were reflected in a side letter dated 24th March 2005 to the Club letter of undertaking dated 23rd March 2005. The former was in similar, if not the same, terms as the undertaking given by the Club in the order. Of 23rd March. The latter undertaking was governed by and construed in accordance with English law, and responded: *"In the event of an award due to cargo owners from the owners of the above-named ship by 'a final unappealable arbitration award, or by a judgment of a competent court or tribunal as may be agreed between the parties'."*

It was in a sum not exceeding FCFA 25 million, inclusive of interest and costs.

17. By the time of the hearing before me it was accepted by Mr. Layton, on behalf of the Claimants, for the purposes of the application only that the actual order granted by the Dakar Curt when the vessel was arrested was an order for the purposes of obtaining security for the claim and that that of itself would not constitute a breach of the London arbitration clause. Likewise the Claimant accepted, that the invoking of the jurisdiction of the Dakar court merely for the purpose of obtaining an order in the terms made by the Dakar Judge was not per se a breach of the London arbitration clause. Mr. Layton submitted, however, that that is not the end of the matter. The fact that the order actually granted by the Dakar court appears to be an order permitting arrest for the purpose of security only does not, Mr. Layton submits, mean that this injunction should never have originally been granted by Cooke J. What Mr. Layton submits is that, although the order actually made by the Dakar Court was for the purpose of for security, what in fact CCMN and Axa Senegal actually did was to invoke the jurisdiction of the Senegalese court not merely to obtain security for their claim, but for the purpose of obtaining payment. He submits that the evidence before the court shows that the Defendants were attempting to invoke the Dakar Court's jurisdiction and to use the arrest proceedings in a manner designed to ensure that the substance of the cargo claim was litigated in Senegal and to circumvent or frustrate the express London arbitration clause providing for determination in London. He submits (and this is the argument that arose during the course of the hearing and in the subsequent post-hearing submissions) that it is not enough merely to look at the true characterisation of the terms of the order made by the Dakar Court, albeit that he accepted that that was the way in which the matter was argued before Cooke J. Thus, in effect, Mr Layton submits that it is necessary to look at the wider picture with

the result that the Court should ask itself the question whether, in acting in the way that it did, the Defendants were attempting to render the London arbitration clause meaningless.

18. As I have said, the Claimants' submission is that the Claimants were entitled at the time of the order made by Cooke J. on 16 March 2005, to restrain the Second Defendants' reliance on the order, notwithstanding that the order itself was an order for the purposes of security, and were entitled to the injunctions which they in fact obtained, because the invocation of the Senegalese jurisdiction by the Defendants was not, when properly analysed, for the limited purpose of obtaining security, but for the wider purpose of ensuring that the resolution of the substantive dispute took place in Senegal and not in London by means of London arbitration. Mr Layton submitted that if the Defendants' invocation of the Senegalese jurisdiction, and the insistence on a Senegalese bank guarantee responding exclusively to Senegalese jurisdiction over the determination of the substantive dispute, meant that the latter had to be resolved in Senegal, the likelihood was that the Claimants, or their P & I underwriters would pay up, since the relatively modest amount of the claim could not justify the expense of disputing it in Senegalese proceedings, as opposed to the relatively modest costs of a London arbitration. Mr Layton submitted, therefore, was that the invocation of the Senegalese jurisdiction was to put pressure upon the Claimants to settle the dispute disadvantageously to the Claimants because of the features that I have mentioned. Accordingly, he submitted that the injunctions had been properly obtained from Cooke J, that his order dated 16 March 2005 should not be discharged, and moreover, that the injunctions should be continued pending arbitration.

19. The relevant principles of law were not in dispute before me. I was referred to the well-known principles in relation to anti-suit injunctions set out in ***Turner v Grovitt*** [2001] UKHL 65 and [2002] 1 WLR 107, and in *Donohue v Armco* [2001] UKHL 64 and [2002] 1 Lloyds Reports 425. The most recent authoritative summary in the House of Lords of the principles on which anti-suit injunctions are granted is contained in the speech of Lord Hobhouse in ***Turner v Grovitt*** at paragraphs 22 to 29. In addition, I refer to the helpful summary by Lord Scott of Foscote in ***Donohue v Armco*** at paragraph 53: *"The principles to be applied in order to decide on the one hand whether an exclusive jurisdiction clause should be enforced by an injunction and on the other hand whether the commencement or continuation of foreign proceedings which are not caught by an exclusive jurisdiction clause should be barred by an injunction seem now well settled and have not been the subject of any real disagreement before your Lordships. It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so. Prima facie parties shold be held to their contractual bargain: see* ***The Fehmarn,*** *[1957] 1 Lloyd's Rep 511; [1958] 1WLR 159;* ***The Chapparal****, [1968] 2 Lloyd's Rep 158; The El Amria, [1981] 1 Lloyd's Rep 119;* ***The Sennar (No 2),*** *[1985] 1 Lloyd's Rep 521; [1985] 1 WLR 490;* ***The Angelic Grace****, [1995] 1 Lloyd's Rep 87. If, on the other hand, there is no contractual bargain standing in the way of the foreign proceedings, "the … court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive"; per Lord Goff of Chievely in* ***Société Nationale Industrielle Aérospatiale v Lee Kui Jak*** *[1987 AC 871 at page 896."*

20. It is clear from the authorities, and again it was not in contention before me, that an anti-suit injunction may be ordered in at least two categories of case:
    i) Where there is a legal right not to be sued in the foreign court where, for example, the foreign proceedings are a breach of a jurisdiction or arbitration clause, or
    ii) Where there is no legal right not to be sued in the foreign court, but there is an equitable right because the pursuit of proceedings in the foreign court is vexatious and oppressive.

21. The Claimants submit that both heads of the jurisdiction are engaged here. The Claimants complain, first of all, of the allegedly wrongful conduct of CCMN as assisted by the Axa Defendants in committing a breach of the contract between it and the Claimants. Secondly, the Claimant relies on the oppressive or vexatious conduct on the part of CCMN. Mr. Layton points, under both heads, to the bringing of the proceedings in Senegal; the procuring of the arrest of the vessel, and the Defendants' refusal reasonable alternative security. As against the Axa Defendants,, it is contended that their conduct was oppressive or vexatious in inducing a breach of the contract between CCMN and the Claimants, or interfering with the Claimants' business relations with CCMN and/or conspiring with each other, and with CCMN, to do each of these things. Again, the particulars of those allegations are that the Axa Defendants induced or procured the bringing by CCMN of the proceedings in Senegal, the arrest of the vessel and the refusal to accept reasonable alternate security.

22. In relation to the first ground of complaint, namely the alleged breach of contract, Mr. Layton submits that the bringing and the conduct of the Senegalese proceedings was a breach of the express London arbitration clause, and also a breach of certain alleged implied terms.

23. So far as the express provision is concerned, that is to say the London arbitration clause, Mr. Layton contends that the CCMN did not merely seek security, but also attempted to seek payment by instituting the proceedings in the form that they did. He contends that the fact that, in the event, the Dakar Court did not order the arrest for the purpose of payment, but merely for the purpose of security for payment, does not alter the fact that invoking the jurisdiction for the wider purpose was a breach of contract.

24. Secondly, in relation to the breach of implied terms of the contract, he submits that, by commencing and conducting the Senegalese proceedings in the way in which it did, CCMN brought about a state of affairs which rendered the express London arbitration clause practically meaningless or would, but for Cooke J's injunction, have done so. He submitted that the courts will readily imply a term to prevent a contractual party from

effectively negating their express bargain. He relies on the classic statement in ***McKay v Dick*** [1881] 6 AC 251 at 263: *"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."*

25. He also referred to the approach of Donaldson LJ, as he then was, in ***Bournemouth & Boscombe AFC v Manchester United,*** The Times, 22nd May 1980, as quoted and followed by Carnwath LJ in ***CEL Group Ltd. v Nedlloyd Lines*** [2004] 1 Lloyds Reports 381 at paragraphs 20 and 21.

26. He submits that the first term, to be implied, applying those principles, is a term to the effect that CCMN should not be permitted to obtain an order for the arrest of the vessel on terms which prevented the release of the vessel from arrest upon the provision of reasonable or alternative security. He submitted that it was axiomatic that alternative security should not be regarded as reasonable if its terms were such, either expressly or in fact, as to require the ship owner to waive reliance on the arbitration clause in order to avoid the prolonged arrest of its vessel and, in the ordinary course of events, a letter of undertaking on its usual terms by an established P & I Club would be a reasonable alternative security unless the cargo Claimant was able to satisfy the Court to the contrary.

27. He also submitted that a second term should also be implied for similar reasons, to the effect that CCMN should not be permitted to procure the arrest of the vessel for any purpose other than to obtain security for its claims.

28. In his alternative submission under the second head, he submitted that the Axa Defendants and CCMN were acting in an oppressive and vexatious manner because the way in which they acted, as I have already described, was calculated to make it realistically impossible to obtain a resolution of the cargo claim in the chosen form, namely a London arbitration, because, in practice, in order to have achieved that result, the vessel would have had to have remained under arrest for months until a bank guarantee had been obtained. He goes on to submit that, but for the injunction, the pressure on the Claimant to have waived its right to have the dispute resolved in London arbitration, given the wholly disproportionate economic consequences of allowing the arrest to remain in place, as compared with the amount of the claim, would have been great If the pressure had been resisted, either the Claimants would have had to have obtained a guarantee on whatever terms they could obtain, or the ship would have remained under arrest.

29. So far as Axa Senegal is concerned, he also pointed not only the evidence in relation to this vessel but alsoto the course of conduct to which Mr. Parton's evidence referred, in relation to other vessels. This evidence showed that, in relation to a number of other vessels, Axa Senegal was maintaining the line that arbitration provisions subject to English law and English jurisdiction should be disregarded, and that Axa Senegal was insisting upon bank guarantees specifying Senegalese jurisdiction for the resolution of the claims.

30. Although there was objection on Mr. Happe's part to the use of these examples from other cases, no application was made to exclude the evidence. In the absence of any application to exclude the evidence, it seems to me that I am entitled to rely on this as evidence against the Axa Defendants.

31. Mr. Happe, in his helpful submissions on behalf of the Defendants, submits in summary that there was no breach whatsoever of the London arbitration clause, or the exclusive jurisdiction clause, because the proceedings in Senegal to arrest the vessel were simply as the order provided, and as has now been conceded for the purposes of the application, security proceedings. Mr. Happe pointed out that, as presently pleaded, the only claim made against the Second Defendant is that, in applying "for an order that the vessel be arrested as security and for payment of the debt which it was claimed was owed to it by the Claimant", the Second Defendant was in breach of its obligations to submit all disputes to arbitration in London. Mr. Happe submits that, in the absence of a breach of the London arbitration clause, the claims against all Defendants fall away.

32. Mr. Happe submits that, in the light of the Claimant's concession that this is how the order of the Dakar Court should be characterised, there was no justification whatsoever for the grant of the injunction. Indeed, it is submitted that Cooke J. was misled not only on the without notice application by the presentation of the case before him, but also on the *inter parte* application when the Claimant returned to obtain permission to serve out. So, submits Mr. Happe, this Court should conclude that Cooke J would not have granted the original order if he appreciated the characterisation that is now accepted of the order actually made by the Dakar Judge and, accordingly, should set it aside..

33. Mr Happe also submits that there is no justification for implying the terms sought to be implied, and that neither of the terms contended for satisfy the requirement of necessity which is necessary to justify the implication of a term. He also submits that any such implied term would be inconsistent with the provisions of the Brussels Convention, under which it is the court of the place of the arrest which is entitled to determine the form of the security. He contends that there is no justification for characterising the conduct of any of the Defendants as vexatious or oppressive, and that the conduct of which complaint is made does not amount to any interference or violation of the only interest which he submits the Claimants have, which is an entitlement to have London arbitration of the cargo claim. He puts it well in his written skeleton, where he says as follows:

"If the interest sought to be protected is the interest to have the cargo claim determined in London arbitration, and the dispute between the parties is whether the Second Defendant were allowed to arrest the vessel and whether the

Claimants are bound to provide the security ordered by the Dakar court, and if the arrest of the vessel and the provision of the security is not a breach of the London arbitration clause, then:
(i) no material interest of [the Claimant] has been violated, so
(ii) there has been ex hypothesi no vexatious and oppressive behaviour;
(iii) in any event, this court is not the natural forum for the dispute in question so there is no sufficient connection between this court and the right sort to be protected, and this court has no interest in and should not interfere with the security proceedings before the Dakar court".

34. He also made submissions about what actually happened in the communications between the parties. He submitted that the Court should not rely on the assertions by the Claimant that it was the Defendants who insisted on Senegalese jurisdiction, and that the evidence of Mr. Dia is that the Second Defendant at no stage required Senegalese jurisdiction. Likewise, he points to the fact that the application to the Dakar Court contained no mention of any particular form of security, but instead it was the Dakar court which determined the form of security to be provided, as any arresting court is entitled to do under the Arrest Convention 1952, at Article 5. He relied on his own expert, Professor Ndende to support the proposition that, if the Claimants had been dissatisfied with the security that had been ordered, it could have been challenged by the Claimant using a fast track procedure, as was made clear by the Dakar order itself, but no application was made to challenge the security. He says that it was a matter of dispute whether or not a guarantee by a bank in Senegal would have only responded if a Senegalese court had adjudicated in relation to the cargo claim.

35. In my judgment the evidence does show, to the standard of a good arguable case that the First and Second Defendants were attempting to use the security proceedings in Dakar, and the requirements of a bank guarantee issued by a Senegal bank, as a means of avoiding or frustrating the London arbitration proceedings. If the full picture, as it has emerged before me, was known at the time of the first injunction granted by Cooke J., and I include in the definition of "full picture" the characterisation of the Dakar Court's order as an order made by way of security, it is probable that an injunction would nonetheless have been granted by Cooke J. That was because the conduct of CCMN and Axa Senegal, and their refusal to accept a Club letter of undertaking in relation to this cargo claim was effectively frustrating the Claimant's contractual entitlement to have that dispute resolved by way of London arbitration. The clear impression that this Court would have gained from the evidence is that the Defendants were seeking, whether by their use of the security proceedings or otherwise, to have the cargo claim, resolved in Senegal.

36. In my judgment, (a) although the English court would not, and could not, have restrained the Defendants from applying for the arrest of the vessel in order to obtain security for their claim in Senegal, if no adequate security had been forthcoming, and (b) although ultimately it is a matter for the arresting court to decide the terms of the security, that it is reasonable for the respondent to the arrest application to provide, nonetheless, in the circumstances, an English court would have restrained the First and Second Defendants, by way of personal injunction:

i) from insisting before the Dakar Court on a form of security to be provided by the Claimant, in order to allow the arrest to be lifted, that required resolution of the cargo claim in Senegal, whether directly or indirectly;

ii) from putting forward submissions to the Dakar Court that the only reasonable security which the Dakar Court should accept to prevent release of the vessel was a bank guarantee which required resolution of the cargo dispute in, and subject to, Senegalese jurisdiction;

iii) from contending before the Dakar court that only a Senegalese Bank guarantee was acceptable security, in circumstances where the American Club had offered its letter of undertaking (since the effect of such a submission would, if not inevitably, at least probably, have brought about delay at best and resolution of the cargo claim in Senegal at worst.).

In my judgment, such an approach by the English Court would have been perfectly consistent with the principle, as recognised in the Brussels Convention, that it is for the arresting court, where the vessel is present and situate, to decide on the appropriate nature of the security and would have not offended any notions of comity. The English Court would not have been trespassing on the jurisdiction of the Dakar Court; rather the former would have been exercising its undoubted personal jurisdiction over the Defendants based upon "*its assessment of the conduct of the relevant party in invoking [the foreign] jurisdiction";* see paragraph 26 of ***Turner v Grovit*** (*supra.*) In circumstances such as the present, where, given the size of the cargo claim, the American Club letter was clearly adequate and reasonable security, and where there was, on any basis, uncertainty about the willingness of local banks speedily to provide security that responded to determination of the cargo claim by London arbitration,, the Defendants' conduct in contending for security provisions that directly or indirectly would bring about a situation where the London arbitration clause was frustrated, amounted not only, in my view, to a breach of implied terms of the arbitration clause, as described in *McKay v Dick*, but also oppressive conduct. I take on board Mr. Happe's criticisms of the implied terms which Mr. Layton has put forward. Nonetheless, it seems to me that, subject to being properly pleaded out, they satisfy the standard which I am required to apply at this stage, namely a good arguable case on the particular and very special facts of this case. It follows, that in my judgment, had the Court known the full picture as at the date of Cooke J's first order of 16th March 2005, it would indeed have made the order which he did, and, accordingly, I decline to discharge it.

37. That leads me on to the question whether it is appropriate for the Court to impose any new injunction for the future. There is no question of continuing any existing injunction, because, of course, that has been discharged. The Second Defendant, CCMN, has now undertaken in Court to pursue its cargo claim, insofar as it wishes to pursue it at all, only in the London arbitration. So the reality is that there will be no substantive proceedings in Senegal in relation to this claim and the injunction against the Defendants has already been lifted as a result of the undertakings recorded in Cooke J's order of the 23rd March 2005. I do not consider that it would be appropriate to impose new injunctions, in the terms of the previous injunctions, whether against the First or the Second Defendants, simply on the grounds of the further reasons put forward by Mr. Parton in his evidence, namely that to do so would send out the appropriate message to the defendants in respect of their conduct in dealing with future claims, where ship-owners have the backing of Club letters. It seems to me that this Court should only grant injunctions where there is a need to do so to meet the particular circumstances of the case before it. In the light of the undertaking by the Second Defendant, as I have already said, I consider that there is no need to maintain an injunction in this case. Whether the conduct of the Defendants in any future case, in invoking the jurisdiction of the Dakar Court, would amount to a breach of the implied terms of any arbitration clause or to oppressive conduct would depend on the facts of the individual case, and, no doubt, on whether the security offered by the Club was adequate in the circumstances or whether local bank guarantees responding to a foreign arbitration award were readily available.

38. In the events which have happened, and in the light of the way in which the arguments have developed in front of me, the real issue that remains outstanding between the parties in the light of the letter of undertaking and side letter, and the undertaking given by the American Club, both in the side letter and as recorded in the order of the 23rd March 2005, is whether the Claimant was entitled, in all the circumstances, "to restrain the Defendants' reliance on the order of the Dakar court dated the 11th March 2005". During the course of the hearing, I was told by counsel that it would be for both parties to work out the consequences of this judgment, in the light of the undertaking given by the American Club and that the precise impact of my judgment on the undertaking was not something that I had been asked to decide. However, both parties subsequently somewhat resiled from that position. In his post-hearing written submissions, Mr Happe in effect asked me to decide the point and, after delivery of this judgment orally, Mr Layton asked me to clarify my decision for the purposes of the undertaking, which came near to inviting me to decide the point. However, despite the temptation, I have concluded that it is not possible for me to do so – at least without hearing further argument from counsel. The reason is that whether or not the Claimant is required, in the light of this interlocutory judgment, and the absence of any determination of the issue at trial, to provide the alternative security referred to in the undertaking (namely a cash payment as directed by the Dakar Court's order, or a bank guarantee in Senegal in favour of the Second Defendant), depends upon the true construction of the side letter and undertaking. It could be argued, for example, – and indeed, during the hearing I was under the impression that it was going to be so argued - that the words *"if the Claimants Kallang Shipping SA are found* [my emphasis] *not to be entitled to restrain the Second Defendants' reliance on the order of the [Dakar Court] dated 11th March 2005",* were envisaging a determination of that issue at trial, rather than on an interlocutory basis, such as the hearing before me, where necessarily factual issues such as the conduct of the Defendants, the attitude of Senegalese banks and the position under Senegalese law, only had to be established to a good arguable case basis. An alternative argument on the construction of the undertaking, which the Defendants might seek to put forward, is that, in the event that this Court declined to make any further injunctions against the Second Defendant (as it has), the Claimant's undertaking was triggered. For these reasons and because I had not received any arguments from counsel on the construction of the undertaking, or a clear invitation to decide the point, I declined to decide it in my judgment that I delivered orally.

39. However, at the request of Mr Layton, to which Mr Happe did not demur, I did, after the oral delivery of my judgment, clarify my decision not to discharge Cooke J's order in the following respects, which may be relevant to any further debate in relation to the undertaking. In my judgment, reached necessarily only on an interlocutory basis at this stage, the Claimant was entitled to bring proceedings to restrain the Second Defendant from relying on the order of the Dakar Court to this extent; the order of the Dakar Court provided that a bank guarantee was to be put in place by way of security to lift the conservatory arrest; but the Claimant, in circumstances where the American Club had offered, prior to the arrest, what was an acceptable Club letter, was entitled to restrain any reliance by the Second Defendant on that order, other than reliance on the arrest merely to secure the actual provision of the Club letter to the Second Defendant; that was because, in my judgment, the evidence showed (at least to the standard of good arguable case) that the conduct of the First and Second Defendants in obtaining the order of the Dakar Court, their rejection of the Club letter and English jurisdiction and arbitration, their insistence on a Senegalese bank guarantee that might well not respond to a London arbitration award, but only to a determination of a Senegalese Court, was conduct that was directly or indirectly directed to rendering the London arbitration clause ineffective, and was a breach of the terms, express or implied, of the agreement to submit to London arbitration and, or alternatively, oppressive. Moreover, as I have already said, the fact that it is no longer, in my judgment, appropriate to continue the injunction (or, in reality, impose new injunctions) does not mean, in all the circumstances of the case, that the Claimant was not entitled to restrain the Second Defendant from bringing proceedings in Dakar at the time of the initial application to Cooke J.

40. That leaves one remaining issue, which is whether the proceedings should have been brought against the First and Third Defendants.

41. So far as the First Defendant is concerned, that is Axa Senegal, the evidence does in my judgment justify the claim being brought as against Axa Senegal. It appears to me, certainly on the basis of the evidence at this interlocutory stage, that Axa Senegal was involved in calling the shots and taking the stance which I have described in relation to the provision of security. I consider that that provides a sufficient basis to justify Axa Senegal being made a party to these proceedings based on the pleaded allegations of inducing breach of contract, interference with business relations, and conspiracy.

42. That leaves the position of the Third Defendant, Axa France. I am not satisfied that there is any justification, and therefore I am not satisfied there is any jurisdiction, to include the Third Defendant, Axa France, in these proceedings. On any basis, that company's participation, through Mr. Regis Broudin, was extremely limited. A claim against any company for conspiracy is a serious one. It is clear from the evidence that the Third Defendant does not have a controlling interest in Axa Senegal. The corporate structure chart demonstrates that they are merely companies in the same group. Certainly, as Mr. Happe submitted, the First Defendant is a separate corporate entity from the Third Defendant. There has to be real evidence to demonstrate that the Third Defendant, as a separate corporate entity, was involved in any way with the attempt to frustrate the provisions of the arbitration agreement. Moreover, Mr. Broudin, against whom the Claimants made certain allegations, does not work for, or act for the Third Defendant. He works for another company, called Axa CS. Even in that capacity, his involvement was extremely limited. Moreover, it was not in dispute on the evidence that Axa CS did not direct or supervise the activities of Axa Senegal, nor was the reporting line up through Axa CS.

43. In my judgment, on the evidence which I have seen, there is no justification for including the Third Defendant in these proceedings. Accordingly, to that extent, I accede to the Defendants' application to set aside service as against the Third Defendant, with the necessary consequences that it will cease to be a party to the action. However, as to the question of costs of the joinder of that Defendant, I will hear further argument. I will also hear argument from counsel on the form of the order and any consequential matters..

Mr. Alexander Layton QC for the Claimants.
Mr. Dominic Happe for the Defendants.