

JUDGMENT : Mr Justice Lightman: Chancery Division. 31st July 2007

INTRODUCTION

1. I have given a series of judgments on interlocutory applications in this action. The action relates to the business dealings between the claimant Mr Albon ("Mr Albon") (a resident within the jurisdiction) and the defendant Naza Motor Trading Sdn Bhd ("Naza Motors") (a company incorporated under the law of Malaysia which has no presence or property within the jurisdiction). The fundamental issue between the parties is whether the underlying contract between the parties is (as alleged by Mr Albon) an oral agreement made in England subject to English law ("the UK Agreement") or (as alleged by Naza Motors) is a Joint Venture Agreement ("the JVA") signed by the parties in Malaysia governed by Malaysian law. The terms of the rival agreements are different and most particularly the JVA contains a provision for arbitration in Malaysia. Naza Motors denies concluding the UK Agreement as alleged by Mr Albon. Mr Albon contends that his signature on the JVA is forged.
2. On the 26th June 2005 Mr Albon obtained permission under CPR 11 to serve proceedings on Naza Motors in Malaysia pursuing (together with other claims against Naza Motors and claims against its principal shareholder and a director of Naza Motors Mr Nasim) claims against Naza Motors in respect of overpayments allegedly made by Mr Albon to Naza Motors in the course of performance or intended performance of the UK Agreement. In accordance with CPR 11 on the 23rd February 2006 Naza Motors filed an Acknowledgement of Service and on the 13th March 2006 made application to the court for an order declaring that it had no jurisdiction or should not exercise any jurisdiction that it might have and that by reason of the arbitration clause in the JVA the present proceedings should be stayed. For the purpose of that application Naza Motors disavowed reliance on the JVA. I upheld the grant of permission to pursue the claim in respect of the overpayments but I set aside the grant of permission to serve proceedings in Malaysia pursuing the other claims against Naza Motors and the claims against Mr Nasim.
3. By my second judgment given on the 9th March 2007 I dismissed an application by Naza Motors to set aside an alternative service order which Mr Albon obtained under CPR Part 6.8.
4. In my third judgment given on the 29th March 2007 (reported [2007] 2 All ER 1075) I had to consider an application by Naza Motors under section 9(3) of the Arbitration Act 1996 to stay the present proceedings on the grounds that Mr Albon had in Malaysia entered into the JVA and that after the commencement of the present proceedings pursuant to its provisions Naza Motors had initiated in Malaysia arbitration proceedings ("the Arbitration Proceedings"). I shall refer to the arbitrators appointed or to be appointed in the Arbitration Proceedings as "the Arbitrators". In view of Mr Albon's contention that the JVA was a forgery, I had to decide whether the issue of the authenticity of the JVA should be determined by this court or in the Arbitration Proceedings. In my judgment, I held that the issue of authenticity should be tried here. In the course of my judgment I noted as follows: "*[the First Defendant] has responsibly indicated to the Court that it may agree not to take further steps in the Arbitration Proceedings until the court has decided the issue whether the JVA is genuine if the Court decides [as it in fact did]: (1) that it (and not the arbitrators) shall determine the authenticity of the JVA; and (2) that this determination by the court is a necessary preliminary to the grant of a stay under Section 9 [of the Arbitration Act 1996] by reason of the arbitration agreement. Accordingly, I do not need in this judgment to determine whether the injunction ought ever to have been granted and whether it ought now to be continued.*"
5. On the 24th April 2007 Naza Motors made what is referred to as "*the Barrell Application*" seeking to recall and reopen my previous three judgments. That application is fixed for trial with an estimate of five days on the 29th October 2007.
6. On the 23rd May 2006 on an application without notice Mr Albon obtained an order against Naza Motors restraining Naza Motors (amongst other things) from commencing or taking any steps in arbitration proceedings in Malaysia on the ground that the JVA was a forgery. Naza Motors challenged the entitlement of Mr Albon to that injunction, but the necessary full inter partes hearing of the application for the injunction was delayed and the injunction was continued pending trial of the issues which were the subject of my three judgments. A reason for this was that a decision on any of the issues which I had to decide adverse to Mr Albon would render the issue of the injunction academic. The trial of the application and of the issue whether Mr Albon was entitled to the injunction was overtaken by events, for on the 4th July 2007 the injunction was discharged as the sanction for failure by Mr Albon to comply with a court order. Mr Albon now applies for the grant of a fresh injunction in the same terms as the previous injunction. An application in the alternative for relief from the sanction which was effective to discharge the previous injunction has been abandoned.
7. Mr Albon's application raises two issues. The first is whether (as Mr Albon contends) the court has jurisdiction to grant such an injunction. The second is whether, assuming that there is such jurisdiction, (again as Mr Albon contends) the court can and should grant an injunction barring Naza Motors from taking any further steps in the Arbitration Proceedings pending judgment on the Barrell application and (if that application fails) judgment on the issue of the authenticity of the JVA; or whether (as Naza Motors contends) the relief should be limited to barring Naza Motors from inviting the Arbitrators to rule on the authenticity of the JVA but should leave it to the Arbitrators to decide whether to proceed with the arbitration in the interim without prejudice and subject to any determination by this court on the issue of authenticity and accordingly of their jurisdiction.

BACKGROUND FACTS

8. On the 16th May 2006 Mr Albon issued an application returnable on the 23rd May 2006 for two heads of relief. The existing pleading merely pursued claims and sought relief in respect of the alleged overpayments. The first

head of relief sought was permission to amend his Particulars of Claim. The amendment consisted of the addition of new paragraphs 28-32 and additional heads of relief which read as follows:

- "28. The Defendants allege that the matters the subject of this action or some of them are the subject of an arbitration agreement between the parties dated 29th July 2003.
29. There is no such arbitration agreement. The written document purporting to be such an agreement is forged.
30. The Defendants have purported to serve a notice of conciliation under the said purported arbitration agreement and to give notice of the said arbitration.
31. The Defendants threaten and intend to apply to the Courts of Malaysia, or other relevant jurisdiction, for the appointment of an arbitrator and may seek an injunction to prevent the Claimant herein pursuing his action herein.
32. In the premises the Claimant is entitled to an injunction preventing the same.

And the Claimants claims:

...

[Injunctions]

(c) against the Defendants and each of them:

- (i) from commencing or taking any step in any arbitration proceedings, whether in Malaysia or elsewhere, pursuant to an arbitration agreement purportedly agreed by the Claimant and the Defendants and dated 29th July 2006;
- (ii) from issuing proceedings before the Courts of Malaysia or elsewhere seeking the appointment of an arbitrator or arbitrators pursuant to the said purported agreement or (if such proceedings be already issued) taking any further step in such proceedings or;
- (iii) from issuing proceedings before the Courts of Malaysia or elsewhere seeking relief against the Claimant herein in relation to matters the subject of the current action (including, but without prejudice to the generality of this order, an injunction purporting to restrain the Claimant from pursuing this action), or (if such proceedings be already issued) taking any further step in such proceedings."

9. The application for permission to amend was not pursued at later hearings prior to this hearing.
10. The second head of relief sought was the grant of an injunction in the terms sought in the proposed amendment.
11. Mr Albon's solicitors delayed proceeding with or serving the application whilst efforts were made to secure the protection which they required by agreement. The relevant history of events reads as follows. On the 16th December 2005 (some four months after the grant of permission to serve in Malaysia) Naza Motors raised for the first time the alleged existence of the JVA and purported to serve a Notice of Dispute on Mr Albon pursuant to its provisions. By a letter dated the 11th May 2006 (received on the 16th May 2006) Naza Motors' solicitors stated: "Meanwhile the Arbitration in Malaysia has been commenced by our client – your client refuses to nominate his arbitrator and in such circumstances our client will apply to the Malaysian Court for appropriate directions as to the constitution of the Arbitration Panel."

It was in fact not for the Malaysian court but the Arbitrators or the Kuala Lumpur Arbitration Centre to make any such appointment. The reference to the intended application to the Malaysian court gave rise to concerns on the part of Mr Albon.

12. On the 16th May 2006 Mr Albon issued his application for an anti-arbitration and anti-suit injunction. On the 17th May 2006 Mr Albon's solicitors wrote to Naza Motors' solicitors: "Please confirm that your clients will issue no proceedings in Malaysia against our client until the English Courts have finally determined the validity of [the JVA]." FSI, Naza Motors' solicitors, replied the same date: "It is quite proper for our clients to proceed in the Malaysian Court for directions."

Unfortunately the reply did not, as one might have expected, make clear, if this was intended, that the issue of authenticity was not to be subject of the Malaysian proceedings. On the 22nd May 2006 Mr Albon's solicitors wrote again: "We note that your clients are proceeding or proposing to proceed in the Malaysian Courts to enforce the arbitration agreement.... This leaves our client no alternative but to seek an anti-suit injunction. We therefore give you notice that we shall by applying in the Applications Court today at 10.30 a.m. for what used to be called an *ex parte* injunction on notice. ... We consider it wrong that our client should face litigation on the same issue in both this country and in Malaysia both by reason of the cost and because of the risk of conflicting decisions.... There is a danger (and your letter convinces us that it is a real danger) that your clients will seek an anti-suit injunction in Malaysia against our client."

13. At 9.50 a.m. on the 23rd May 2006 Mr Albon gave notice to Naza Motors of the intention to apply for this relief, but the notice period was insufficient to enable counsel to attend on behalf of Naza Motors. The evidence in support was contained in the Fourth Witness Statement of Mr Daniels, Mr Albon's solicitor, who (so far as material) stated as follows:

"9. The Defendants after becoming aware of this action served on the Claimant notices of conciliation and then notices commencing the supposed arbitration. Finers in their letter of 11th May 2006 say that the Defendants will apply to the courts in Malaysia to appoint an arbitrator on the Claimant's behalf. The Claimant was on business in Malaysia last week and I was unable to obtain instructions from him on this until yesterday.

10. *There is a grave danger of three matters. Firstly, the Claimant is liable to be sucked into litigation both in England and in Malaysia. He cannot afford the cost of such litigation. Secondly, there is a danger of conflicting decisions in England and Malaysia as to the validity of the arbitration agreement.*
11. *Thirdly, there must be a substantial risk that the Defendants will apply in Malaysia for an anti-suit injunction, particularly if they have notice of the current application. This is the reason for the current application being made in the first instance without notice. The Claimant has continuing business relations in Malaysia, so that an injunction made by a Malaysian court could potentially be enforced by contempt proceedings, should he visit the country."*
14. Warren J (after adjourning for an hour to read the papers which he was asked to read) granted the injunction sought over the 23rd May 2006. On the 23rd May 2006 Naza Motors attended by counsel, but without having had time to obtain instructions, and the injunction was continued until the hearing of the application or further order. On the 5th June 2006 and again on the 23rd August 2006 Naza Motors made plain its intention to apply for the discharge of the injunction. On the 13th September 2006 Briggs J adjourned the application directing that it be heard as an application by order and continued the injunction over the period of the adjournment on terms that Mr Albon provided security for his cross-undertaking in damages in the sum of £25,000
15. In the forefront of Naza Motors' objection to the grant of the injunction was the contention that Mr Albon had failed to apply for or to obtain permission to serve an Amended Claim Form and the Amended Particulars of Claim in Malaysia. Mr Albon only responded to this objection in February 2007. His response was twofold. First on the 1st February 2007 Mr Albon made an application supported by the eighth witness statement of Mr Daniels to serve in Malaysia invoking as the necessary gateway CPR Order 6.20(5)(c), namely that the claim was made in respect of a contract governed by English law. Secondly in the alternative Mr Daniels contended that Mr Albon was entitled to an injunction irrespective of the existence of a gateway on the ground that it was unconscionable conduct on the part of Naza Motors to commence and prosecute arbitration proceedings in Malaysia duplicating the proceedings in this action relying on the forged JVA.
16. Mr Albon has at all times been in a precarious financial position and the subject of two bankruptcy petitions issued by HM Revenue and Customs ("HMRC"). His dealings with HMRC have not been honest and straightforward. On the occasion of the first petition he agreed a settlement with HMRC under which he would grant a new mortgage of his home to raise £500,000 which he would pay to HMRC. In fact he granted the mortgage but used the £500,000 raised, not in payment to HMRC, but to buy stock for his business. On the occasion of the second petition he did a deal with HMRC that HMRC would not oppose the dismissal of their petition if he paid them £300,000 on the 4th July 2007.
17. At a hearing before me on the 26th June 2007 in view of my concern regarding his ability to satisfy his cross-undertaking in damages I ordered that, if Mr Albon did not by 2 p.m. on the 4th July 2007: (a) pay HMRC the sum of £300,000 in accordance with his agreement with HMRC; and (b) give Naza Motors' solicitors immediate notice as soon as such payment had been made, the injunction should be discharged from that date. On the 4th July 2007 Mr Albon reached agreement with HMRC that, if he had paid them £160,000 before the hearing of the petition on the 17th July 2007, HMRC would not oppose the dismissal of the petition and Mr Albon paid the sum of £160,000 prior to 2 p.m. on the 4th July 2007 and the petition was dismissed. By common consent, by reason of the failure to pay the sum of £300,000 on the 4th July 2007 the injunction was discharged.
18. At the next hearing before me on the 9th July 2007 the Claimant indicated that the Claimant proposed to apply seeking in the alternative relief under CPR 3.9 from the sanction for failure to comply with the conditions laid down in my order of the 26th June 2007 and the fresh grant of the injunction. The hearing before me commenced on the 23rd July 2007. In the course of the hearing for the first time Mr Albon informed the court that he would not be pursuing the application for relief.

JURISDICTION

19. It is necessary at the outset to consider whether there is jurisdiction to grant the injunction sought and the basis for that jurisdiction. The application before Warren J was made on the basis that there was by way of amendment a substantive claim in the draft Amended Particulars of Claim and (as pleaded) a substantive entitlement to a permanent injunction restraining the prosecution of arbitral and court proceedings in Malaysia. Warren J was not put on notice that permission was required to serve the Amended Claim Form and Amended Particulars of Claim claiming this entitlement and this permanent relief on Naza Motors in Malaysia. It would appear that Mr Albon's legal advisers gave no real (if any) thought to this question until February 2007. An application was then made for permission to serve in Malaysia the draft Amended Claim Form and Amended Particulars of Claim invoking gateway CPR 6.20(5)(2) and in the alternative the contention was advanced that no gateway was required for the grant of an interlocutory injunction pending determination by this court of the authenticity of the JVA.
20. In my first judgment I had to consider the ambit of CPR6.20(5) which provides that a claim form may be served out of the jurisdiction with the permission of the court if a claim is made "in respect of a contract" where the contract is governed by English law, and I held that this required only that the claim relates to or is connected with such a contract. The issue now before me is whether the grant of an anti-suit injunction in connection with a contract governed by English law is a claim made in respect of the latter contract. Some guidance is provided by the judgment of Aikens J in *Youell v. Kara Mara Shipping* [2000] 2 Lloyd's Rep 102 at paragraph 50 where he held that such a claim was a claim which (in the language of RSC Order 11(1)(d)(iii)) "affects" such a contract. If the claim is one which affects such a contract, there can be no doubt that it is a claim which is made "in respect of" such a contract. I should add that I reject the contention made by Mr Nathan that the claim to the injunction comes

within the definition of an arbitration claim in CPR 62.2. The heading to Part 1 of the Arbitration Act 1996 is "claims under the 1996 Act" and is concerned both with applications under that Act and applications to which the Arbitration Act 1996 has been extended (e.g. under the ACAS Arbitration Scheme) and with claims under the common law jurisdiction expressly preserved by section 72 of the 1996 Act. CPR 62 has no application to claims such as the present in respect of foreign arbitrations: see e.g. *Arbitration Law (2004)* by Robert Merkin (pages 47, 50 and 55).

21. If I am wrong, and Mr Albon's claim to an injunction does not fall within that gateway, there is nonetheless scope for the grant of an injunction pending the determination by this court (so long as the claim is maintained) of the claim by Naza Motors to a stay of these proceedings and accordingly the determination by this court of the authenticity of the JVA. The general rule is that the court does not have jurisdiction to grant anti-suit injunctions against a defendant who is a foreign party brought into the jurisdiction by answering a claim under CPR 6.20. The position is however different if the foreign party has willingly submitted to the jurisdiction without reservation or has invoked the jurisdiction of this court by making a counterclaim (see *Glencore International v. Exter Shipping Co* [2002] 2 All ER (Comm) 1, [2002] EWCA Civ 528, at paragraphs 45-50).
22. In this case Naza Motors is a foreign party brought into the jurisdiction by answering a claim within CPR 6.20: it has not willingly submitted to the jurisdiction without reservation and it has not brought a counterclaim. But it has however applied for a stay, and this application for a stay is ongoing and requires the court (so long as the claim to the stay is maintained) to adjudicate on the authenticity of the JVA. In these circumstances, this court must have power to protect its processes in the course of and for the purposes of determining the claim to the stay, and this must include (where necessary) the power to grant an injunction restraining Naza Motors from taking steps within or outside the jurisdiction which are unconscionable and which may imperil the just and effective determination of the claim to the stay: consider *Grupo Torras v. Sheikh Fahad* [1995] 1 Lloyd's Rep 374 at 392-3. As I have already said, Naza Motors can at anytime effectively bring an end to this jurisdiction by abandoning the claim to a stay.

PERMISSION

23. I think that the pleaded claim to an injunction falls within the gateway relied on and that the necessary permission should be granted to serve the Amended Claim Form and Amended Particulars of Claim in Malaysia. Having carefully read the transcript of the hearing before Warren J, I have no doubt that he would have granted such permission if sought. But that is no justification for the serious failure on the part of Mr Albon's lawyers to bring to the judge's attention the need for such permission. But taking full account of this breach of duty, I do not think that there is any sufficient reason why permission should not now be granted. I have been addressed at length and in detail by Mr Nathan on behalf of Naza Motors on the issue whether there was any other serious breach of duty and non-disclosure. Whilst in no way detracting from the importance of full disclosure by parties making without notice applications, I have had occasion on earlier occasions in this case to protest against mini-trials on the issue whether there has been such disclosure. It is sufficient to say that Mr Anderson has taken me through the transcript of the hearing before Warren J and the evidence before Warren J, and he has satisfied me that there is no basis for any substantial or sufficiently substantial complaint in this regard.
24. I should add that in my view the issue whether permission should be given to serve the Amended Claim Form and Amended Particulars of Claim in Malaysia is of limited (if any) real significance and unlikely to affect the outcome of these proceedings, for on any basis the claim to like relief may be proceeded with on the alternative basis which requires no gateway.

GRANT OF INJUNCTION

25. Mr Albon and Mr Nasim were close friends and business associates. This lengthy, expensive and acrimonious litigation is a disaster for all concerned. At the first trial I encouraged negotiations for settlement. Both parties appeared receptive but to date these do not appear to have progressed. At the hearing of this application, I suggested that all disputes be resolved by arbitration in a neutral forum (e.g. Singapore). Both parties agreed in principle to this course, but emphasised the need for (and potential difficulty in) "fine tuning" the terms of any such agreement.
26. I have likewise sought agreement between the parties (assuming that I held that I had jurisdiction to grant the injunction sought) as to the terms of an injunction or undertaking pending the outcome of the Barrell Application and (if that application fails) the trial of the issue of the authenticity of the JVA. Both parties have made moves in the direction of agreement, but insufficient for any consent order.
27. I have concluded in principle (and in default of a satisfactory undertaking) that Mr Albon is entitled to the injunction which he seeks. I do not think that the position has materially changed from the circumstances prevailing on the 29th March 2007 when Naza Motors gave the indication that it might agree not to take further steps in the Arbitration Proceedings until the court had decided whether the JVA was authentic. The threat by Naza Motors to apply to the Malaysian court gave rise to the claim to the anti-suit injunction. Naza Motors' solicitors letter of the 17th May 2006 in response to Mr Albon's solicitor's letter of the previous day not unreasonably gave rise to concern, as they did not confirm that the issue of authenticity of the JVA was a matter for the English court alone. To protect Mr Albon from any temptation on the part of the Arbitrators to assume jurisdiction to determine the issue of authenticity, I requested Mr Nathan to enter an agreement with Mr Albon excluding the Arbitrators' jurisdiction to determine this issue. Mr Nathan proffered an undertaking not to invite the Arbitrators to determine this issue and to enter an agreement limiting the Arbitrators jurisdiction as requested but (significantly) conditional upon Mr Albon agreeing to participate in the Arbitration Proceedings. In my judgment the undertaking is not

sufficient: it does not preclude the Arbitrators purporting to determine the issue and Mr Albon will not agree and is entitled to refuse to participate unless and until the court decides not to grant an injunction. In my judgment the injunction sought is necessary to protect the interests of Mr Albon in the present proceedings. For Naza Motors to prosecute the Arbitration Proceedings or to allow the Arbitrators to proceed with them pending determination whether Naza Motors forged Mr Albon's signature on the JVA is to duplicate or allow duplication in its entirety the present proceedings. This must be oppressive and unconscionable: consider *Tonicstar v. Atta* [2005] 1 Lloyd's Rep 32. Both sets of proceedings would be concerned with exactly the same subject-matter: compare *Elektrim SA v. Vivendi* [2007] 2 Lloyd's Rep 8. It is significant that Mr Nathan will not unconditionally agree to ruling out this possibility.

28. My mind has wavered over the question whether the injunction which I should grant (whilst precluding the Arbitrators from determining the authenticity of the JVA and accordingly the existence of their jurisdiction) should leave it open to Naza Motors to proceed with the Arbitration inviting the Arbitrators to determine what (if any) steps can and should be taken in the interim and without prejudice to the determination of authenticity here. This is a course which is expressly provided for in domestic arbitrations by the Arbitration Act 1996. At the end of the day I have decided not to leave this course open to Naza Motors.
29. My reasons are essentially as follows: (1) whilst Mr Albon will unconditionally agree to do so, Naza Motors will not unconditionally agree with Mr Albon to exclude from the jurisdiction of the Arbitrators the issue of the authenticity of the JVA and the proffered undertaking not to invite them to determine that issue would be insufficient protection to Mr Albon if the Arbitrators were minded otherwise; (2) there is undoubtedly some, but it must be very limited, scope for the Arbitrators to proceed with the arbitration until the issue of the authenticity of the JVA and (with it) the terms of the contract between the parties has been decided; (3) whilst I consider that Mr Albon could raise the necessary funds from his wife and her mother to participate in the Arbitration Proceedings whilst the present action is proceeding, in all the circumstances I think that it would be oppressive to require him to do so whilst he is still exposed to the enormous costs of pursuing this action; and (4) the period of added delay in awaiting the final determination of the authenticity of the JVA should be short, and indeed would be very short indeed if Naza Motors did not continue to maintain its objection to this court resolving as a matter of urgency (as it has offered to do so) the issue of authenticity of the JVA.
30. I have made it clear that the fresh grant of an injunction (like the continuance of the previous injunction by Briggs J) will be conditional upon Mr Albon securing his cross-undertaking in damages. Mrs Albon and her mother have agreed to provide the necessary funds for this purpose. I will hear the parties upon the question of quantum. Subject only to determining the quantum and the placing of security in place, I will grant the injunction sought until further order.

Mr Robert Anderson QC & Mr Andrew George (instructed by Sheridans, Whittington House, Alfred Place, London WC1E 7EA) for the Claimant
Mr Stephen Nathan QC & Mr Neil Kitchener (instructed by Finers Stephens Innocent, 179 Great Portland Street, London W1W 5LS) for the Defendants