CA on appeal from QBD (Mr Justice David Steel) before Tuckey LJ; Longmore LJ; Lloyd L:J. 12th July 2007

Lord Justice Tuckey:

1. This is an expedited appeal from David Steel J's refusal to grant the three claimants an anti-suit injunction to restrain proceedings against them in New York by the second and third defendants. The claimants are domiciled in England and are or were employed as reinsurance brokers by the first defendant (MSL), an English company and part of the well known Marsh McLennan group (the MM group) of companies of which the third defendant (MMC) based in New York is the holding company and the second defendant (GC) forms part.

2. On 2 April 2007 the claimants each gave MSL six months notice to terminate their contracts of employment and disclosed that they intended to work for Integro, one of the MM group's competitors. The New York proceedings started a month later and are founded upon the terms of an incentive award granted to the claimants under which they assumed obligations to repay the award if they engaged in detrimental activity and to provide information to enable "the Company" to determine whether they had complied with the terms of the award.

3. The claim for an anti-suit injunction is made on the ground that the New York proceedings are matters relating to the claimants' individual contracts of employment and have been brought by their employer so the provisions of section 5 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters require such proceedings to be brought only in the courts of their domicile. The judge disagreed and also rejected an alternative ground to the effect that the New York proceedings should be restrained because they were unconscionable, vexatious and oppressive.

4. MSL is the English service company for the MM group. MSL's business is simply to employ persons whose services are then provided to other companies within the group in this country. Its contracts of employment with the claimants are unexceptional. They contain all the usual terms which one would expect to find in such a contract including eligibility for an annual cash bonus and non-solicitation provisions after termination. Under these arrangements the claimants, who live in England, worked in the London market for GC and its associated English company specialising in facultative reinsurance.

5. The claimants held senior executive positions and became eligible to participate in the MMC 2000 Senior Executive Incentive and Stock Award Plan. The 15 page document which established this plan said that its purposes were to advance the interests of MMC and its stockholders by providing a means to attract, retain and motivate its employees and those of its subsidiaries and affiliates and strengthen the mutuality of interest between such employees and the company stockholders. The defendants' evidence is that it makes sense to have one central plan awarding shares in a group's parent company to senior employees who are employed by many different companies within the MM group in many different countries. Awards under the plan were administered by MMC in New York and decisions were subject to the approval of its board of directors.

6. The November 1 2005 Guy Carpenter Special Long Term Incentive Grant was made under the auspices of the plan. This award was subject to the terms and conditions of the plan itself and additional terms and conditions. The document containing these terms and conditions (which I shall call the bonus agreement) was signed by each claimant and recited that: *In recognition of your potential for future contributions to the success of MMC, this award is intended to strengthen the mutuality of interest between you and MMC's share holders and to serve as an appropriate additional incentive to remain with MMC or any of its subsidiaries or affiliates (collectively, the "Company"). For purposes of this agreement "MMC" means Marsh & McLennan Companies, Inc…*

7. The bonus agreement runs to 16 pages. It was subject to New York law and exclusive jurisdiction except as provided by schedule II D. The awards were of cash rather than stock and subject to the employee's *"continued employment"*. They were to be paid in instalments over a number of years. But they were subject to cancellation and rescission if the recipient engaged in detrimental activity. Before termination such activity is defined to include attempting to recruit or solicit any employee of the Company to work for any actual or prospective competitor (I C. (1) (f)) Rescission required repayment to MMC of any instalment paid in the 12 months before the detrimental activity had taken place (I C. (2) (b)).

8. The bonus agreement also contains a number of covenants. These relate to notice (II A.), non-solicitation (II B.), confidentiality (II C.) and disclosure (II F.). The co-operation covenant (II E.) says: "*You agree that both during and after your employment with the Company, regardless of the reason for your termination, you will provide to the Company such information relating to your work for the Company or your other commercial activities as the Company may from time to time reasonably request in order for the Company to determine whether you are in compliance with your obligations under this Agreement.*"

9. The penultimate covenant (II G.) under the heading Non-Exclusivity of Rights says: "*Neither you nor the Company intends to waive or release the applicability of any other employment duties or obligation you and the Company may have or owe to each other, now or hereafter, unless such duties or obligations conflict with those set forth in this Agreement. In particular you and the Company acknowledge that any more extensive duties or obligations you may owe the Company by law or contract now or hereafter,… shall not be considered to conflict with, or otherwise be released or waived by, this Agreement.*"

10. The agreement also provided that: *This award does not give you any right to continue to be employed by the Company for any specific duration, or restrict in any way, your right or the right of your employer to terminate your employment, at any time, for any reason, with or without cause or prior notice. This award is a special one-time*

award, which does not form part of your on-going compensation and is not taken into account in calculating any other compensation or benefits…"

11. Schedule II D. applies to UK employees. For this schedule the Company is defined as "*the company in the group which is your employer"*. For UK employees the schedule modifies the definition of detrimental activity occurring after termination (2) and also the covenants relating to notice (3) and non-solicitation (4). It also provides for this schedule to be construed in accordance with English law and the non-exclusive jurisdiction of the English courts to settle any dispute arising in connection with it (6).

12. Each of the claimants has received part of his award under the bonus agreement. The payments were made by MSL in London subject to deduction of U.K. tax and national insurance under the PAYE scheme.

13. As soon as the claimants gave notice they were put on garden leave. The defendants allege that 14 of the 32 brokers working in the GC Facultative business in London were recruited or approached by Integro, a New York based business with ambitions to establish itself in the London market. It suspects that the claimants were behind this and have therefore been acting in breach of their obligation not to recruit or solicit other employees.

14. On 5 April 2007, Herbert Smith writing on behalf of GC, MSL and MMC and relying on the co-operation covenant in the bonus agreement, asked each claimant a series of questions directed to discovering the circumstances surrounding their resignation and what contact they had with Integro and other group employees before and since this time. After an exchange of inconclusive correspondence with the claimants' English solicitors proceedings were started on 4 May in the United States District Court for the Southern District of New York. Only GC and MMC, both Delaware companies, were the plaintiffs. Relying on the terms of the bonus agreement the claim sought a mandatory injunction to compel compliance with the co-operation covenant and repayment of the awards made to the claimants on the ground that they had engaged in detrimental activity. In a section of the pleading headed *"Defendants Employment with Plaintiffs*" GC are alleged to be the employer and the pleading says that the claimants' employment *"was and continues to be governed by their respective employment agreements with plaintiffs"*. However, despite these assertions, no claim was actually made under the employment agreements.

15. The claim was accompanied by requests for discovery, interrogatories and depositions. The proceedings have been served on the second claimant and (as Judge Denise Cote in New York has decided) on the other two claimants as well. Jurisdiction was contested. But on 18 May Judge Cote decided that expedited orders should be made despite the jurisdiction challenge (which she has since rejected). She made the orders requested and laid down a very tight timetable for compliance.

16. This led the claimants to issue these proceedings for declarations about jurisdiction and a worldwide anti-suit injunction relying on section 5 of the Regulation. The defendants issued a cross-application for an order under the provisions of section 25 Civil Judgments and Jurisdiction Act 1982 in aid of the New York proceedings, alternatively (without prejudice to their case on jurisdiction) for mandatory injunctions to the same effect as those made in New York. The claimants' application for an interim anti-suit injunction was heard and dismissed by David Steel J. on 6 June. The defendants' cross-application was adjourned and has not been pursued because they prefer to enforce the provisions of the bonus agreement in New York.

17. The New York claim came back before Judge Cote on 11 and 12 June when she was told that MSL and not GC was the claimants' employer. This did not cause her to reconsider her earlier decision. She made orders which required the second claimant to give discovery and answer interrogatories without further delay and attend for depositions in London on 14 June. Both events took place as ordered.

18. Judge Cote also ordered the other two claimants to attend for depositions in London on 20 and 21 June. This led the claimants to apply to this court (Rix and Arden L.JJ) on 20 June to restrain the New York proceedings pending the hearing of this appeal with a view at least to preventing the depositions due to start that day from taking place. This application was dismissed on the ground that the balance of convenience was against the grant of such an injunction. The other two claimants were then deposed.

19. As well as the present proceedings, on 12 June the claimants issued further proceedings in the Queen's Bench Division for declarations that by their conduct of the litigation the defendants had repudiated their contracts of employment and that the bonus agreements were unenforceable for a variety of reasons. Particulars of claim have been served and directions sought for a speedy trial.

20. The defendants contend that the depositions and discovery obtained from Integro in New York give cause for concern and that they need to continue the New York proceedings to enforce the co-operation and repayment provisions in the bonus agreements and discover more about the claimants' activities. Very recently they have listed items which they wish to follow up and the claimants have responded with offers of undertakings, to be given if necessary in the English proceedings, which meet a number of the defendants' requests.

21. We heard argument on 6 July. One of the questions we had to consider was whether we should decide simply if there was a serious issue to be tried as to whether the Regulation was engaged and if so, whether an interim injunction should be granted on the balance of convenience, or whether we should decide the point finally. If we had followed the former course the judge at trial of these proceedings would have to decide the point finally with the possibility of a further appeal from his decision. So, with the consent of both parties, we decided to follow the latter course on the basis that all the material to enable us to do so was before the court.

22. After this brief summary of the background and history of this hard fought dispute I need first to refer to the relevant provisions of section 5 of the Regulation which have the force of law in the U.K. These are as follows:

Section 5: Jurisdiction over individual contracts of employment.

Article 18

(1) In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section…

Article 20.

(1) An employer may bring proceedings only in the courts in the Member State in which the employee is domiciled…

Article 21.

The provisions of this Section may only be departed from by an agreement on jurisdiction:

(1) which is entered into after the dispute has arisen; or

(2) which allows the employee to bring proceedings in courts other than those indicated in this Section.

23. The first issue for the judge to decide was whether these provisions were engaged. Did the claimants have a right not to be sued in New York for breach of the bonus agreement? He decided this question against the claimants because the New York proceedings did not relate to individual contracts of employment and also because these proceedings had not been brought by the claimants' employer (MSL) so Article 20 (1) did not apply. His reasons for the first conclusion were that the bonus agreement was not a contract of employment because it did not have the hallmarks of such a contract; it did not contain the mutual obligations to provide and carry out work in return for appropriate remuneration. Furthermore the obligations in the bonus agreement were owed to all the companies in the MM group and not just to the claimants' employer and the public policy concerned to protect employees did not have much bearing on this case as it involved very senior executives within the MM group.

24. Mr Dunning Q.C. for the claimants on the appeal submits that the judge's approach was essentially flawed because he failed to construe the meaning and effect of section 5 with the objectives of the Regulation uppermost in his mind. If he had done so he would have been compelled to reach the opposite conclusion to the one he reached.

25. It is well established that the terms used in an instrument such as the Regulation have to be given an autonomous (European) meaning so that each Member State will apply it consistently and not interpret it in accordance with its own national law. So what are the objectives of the Regulation? Those which are relevant can be gleaned from recitals 11 – 15. Thus the Regulation is obviously designed to avoid jurisdiction disputes. To this end it aims to achieve certainty and avoid multiplicity of proceedings. Jurisdiction is allocated to the court with the closest connection to the dispute. The general rule is that a party is entitled to be sued in the courts of his or her own domicile, but there are exceptions to this rule, for example where the parties have agreed otherwise (Article 23). In matters relating to contracts of employment however, the employee can only be sued in the court of his domicile (Article 20) unless he has agreed to some other jurisdiction after the dispute has arisen (Article 21 (1)). These special provisions meet one of the objectives of the Regulation which is to protect employees who are regarded as the weaker party in the employment relationship from a socio - economic point of view. So much is common ground between the parties in this case, as is the principle that if section 5 is engaged the fact that the employer is not domiciled in a Member State is irrelevant (see ***General Insurance v Group Josi*** *[2001] QB 68*).

26. So is there any guidance from the European Court of Justice to help us decide whether the New York proceedings relate to individual contracts of employment and have been brought by the claimants' employer within the meaning of Articles 18.1 and 20.1 of Regulation?

27. Mr Dunning relied on ***Pugliese v Finmeccanica*** [2004] All ER (EC) 154, a case in which an employee had contracts of employment with different employers in different Member States. The ECJ said she might be able to sue one employer in the Member State where she was working for the other if the former had an interest in her working for the latter. The court said that such an interest: "*does not have to be strictly verified according to formal and exclusive criteria but must be determined in an overall manner taking into consideration all the facts of the case [24].*"

However beyond showing that the quest is to avoid multiplicity of proceedings and to ensure adequate protection for the employee and in doing so not to take an over formalistic approach, I do not think this case really sheds much light on our case.

28. There are in fact no relevant ECJ cases on section 5. Mr Rosen Q.C. for the defendants relied on the English case of ***Swithenbank Foods Limited v Bowers*** [2002] EWHC 2257 (QB), where a defendant domiciled in France was sued here in tort on the basis that he conspired with other defendants to interfere with the claimants' contractual relationship with one of its main suppliers and in contract on the basis that he acted in breach of his duty of fidelity as an employee in joining the conspiracy. The judge held that section 5 applied to the contract, but not to the tort claim. In considering the meaning of "*matters relating to contracts of employment*" he said that the advantage given by section 5 to an employee as a member of a class should be confined to cases where his status as an employee was legally relevant, rather than to the relationship generally. The fact that the defendant was an employee was not legally relevant to the conspiracy claim which was not a contractual claim at all. So the decision in this case is readily understandable, but again I do not think it sheds any real light on our case.

29. So is the claim made in New York a matter relating to the claimants' individual contracts of employment? It is obviously a "matter" and the word "individual" is apparently used to make it clear that section 5 does not apply to collective agreements. The words "relating to" are used throughout the Regulation. For the purposes of deciding

this case it does not seem to me that they need to be given a wide meaning. The question is simply whether the claim is based on a contract of employment. The contract need not be in one document or made at one time. An agreement varying or adding to the terms of an earlier contract of employment will obviously become part of that contract even if on its own it does not contain all the terms one would expect to find in such a contract.

30. The claim in the New York proceedings is for breach of the bonus agreement. Did the terms of that agreement become part of the claimants' contracts of employment? Mr Rosen accepts, as he must, that the bonus agreements are connected to the claimants' employment by MSL but submits that they are free-standing and, as such, the judge was right to find that they do not have the hallmarks of contracts of employment.

31. I have only summarised the terms of the bonus agreement. But from those terms which I have quoted or referred to I can demonstrate why it is that I do not accept Mr Rosen's submissions. The recital refers to the award as an incentive "to remain with" MMC or any of its subsidiaries or affiliates. Payment of the award is subject to "your continued employment". The notice, non-solicitation, confidentiality, disclosure and co-operation covenants given to "the Company", which of course included MSL, add to and in some cases differ from the terms of the claimants' original contracts of employment with MSL. The non-exclusivity covenant ([9] above) purports to deal with any such conflict. The modified notice and non-solicitation covenants in schedule II D. for U.K. employees are given only to MSL as it is the U.K. company in the MM group employing the claimants. In short I cannot see how it can be said that the claimants' bonus agreements do not relate to their contracts of employment. They are part of them. One cannot ascertain the terms upon which they were employed without looking at both the original contracts and the bonus agreements.

32. So, given that the claim in New York relates to the claimants' individual contracts of employment, has it been brought by "an employer" within the meaning of Article 20? Mr Rosen's submission is simple: it has not; the employer, MSL, is not a plaintiff in those proceedings. Mr Dunning submits that this cannot be right. The claimants have assumed obligations under the bonus agreements to all the companies in the MM group in matters relating to their contracts of employment. In these circumstances any company in the group selected to sue should be regarded as the employer for the purpose of the Regulation, otherwise its objectives will not be fulfilled. Mr Rosen countered by saying that these arguments put a strained and unnecessary construction on section 5 and by ignoring the separate corporate identities of the various companies in the MM group they involved piercing the corporate veil. His construction achieved certainty by giving effect to the exclusive New York jurisdiction clause. The bonus agreements had a close connection with New York because the plan was administered and subject to regulation there. The claimants were not employees who needed protection because they were senior well-paid executives.

33. At first sight Mr Rosen's main submission appears formidable. As a matter of English law at least, MSL is the claimants' employer and MMC and JC are not. It is of course possible for an employee to have two or even more employers but that is not the way the case is put. But on further consideration I do not think Mr Rosen is right. The question of whether MMC and GC should be regarded as employers for the purpose of section 5 has to be considered together with the fact that their claim in New York is a claim relating to a contract of employment brought against English employees. It is an employment claim against the employees and one would expect such a claim to be made by an employer. MMC and GC have only been able to sue in the right of and as if they were employers because of the wide definition of "the Company" in the bonus agreement and so I think they should be regarded as employers for the purpose of section 5. MSL, who also come within this wide definition, could only have sued in England to enforce the terms of the claimants' employment. MMC and GC as companies within the same group have an economic interest in the contracts containing those terms and their enforcement and should be subject to the same jurisdictional restraint as MSL. I do not think that this is a strained construction. It simply recognises the reality of the situation without adopting an over formalistic approach. A similar approach to construction was taken by this court in the recently reported case of ***Beckett Investment Management Group Ltd. v Hall*** [2007] EWCA Civ 613.

34. Nor does this construction pierce the corporate veil in any real way. The Regulation is only concerned with the allocation of jurisdiction. The fact that MMC and GC should be treated as employers for such purposes does not mean that they should be so treated for any other purpose.

35. A construction of section 5 in the way I have indicated gives effect to the objectives of the Regulation. It achieves certainty and avoids multiplicity of proceedings by ensuring that all those companies in the MM group who wish to sue on the terms of the bonus agreement are required to sue in the courts of the employees' domicile. Otherwise MMC and any other company in the MM group could sue in New York and MSL would have to sue in England. The English courts have the closest connection with the dispute, concerning as it does the claimants' activities during their employment and receipt of the award in England. The fact that the plan is administered and regulated in New York is of no relevance to the present proceedings. This construction also offers the claimants protection from proceedings in jurisdictions other than that of their domicile. Section 5 applies to all employees irrespective of any particular need for protection. But if these claimants are entitled to be sued here I can well understand why they feel the need to be protected from the proceedings in New York.

36. There is a further point which can be made about the cooperation covenant ([8] above) upon which MMC and GC rely in the New York proceedings. As I read this provision it is intended to confer the right upon the employing company. If so it would appear that MMC and GC regard themselves as employers for the purpose of enforcing this right. This may partly explain GC's mistake in asserting that it was the employer.

37. For these reasons I conclude that section 5 is engaged in this case. It follows that we must disregard the exclusive New York jurisdiction clause in the bonus agreement because it was agreed before the dispute arose.

38. So does it follow that we should grant an anti-suit injunction? Mr Dunning submits that we should because it is the only way to make the claimants' statutory right to be sued here effective. Damages would not be an effective remedy. Mr Rosen accepted that we could grant an anti-suit injunction if we found that section 5 was engaged but urges us not to do so as a matter of discretion and judicial restraint and in the interests of comity.

39. The position we are in is as follows. The New York court has rejected the challenge to its jurisdiction because of the clear and unambiguous terms of the exclusive New York jurisdiction clause in the bonus agreements. Had we not been concerned with the contracts of employment we should have upheld such a clause as well. But, as it is, our law says that we cannot give effect to it. The claimants can only be sued here. What shall we do? The only choice it seems to me is between an anti-suit injunction or nothing.

40. An anti-suit injunction is not a remedy to be dispensed lightly, particularly where the defendants sought to be restrained have brought proceedings in courts of high repute in a friendly foreign state. The injunction of course is directed at the litigating party and not the court. The premise for the remedy is that this party should not be litigating in that court and so the principles of comity are not offended by granting an injunction which does no more than require that party to comply with his legal obligations and ensure for the claimant that he does so. Although this is the correct analysis, one can understand why not everyone would see the situation in quite this way which is why the court should always be cautious before granting such relief.

41. We were referred to various English cases which have dealt with these problems in the context of commercial disputes where injunctions have been claimed on the basis of an exclusive jurisdiction clause or forum conveniens. But no case was cited to us where the exclusive jurisdiction of the English court was mandated by statute. Mr Dunning submitted that where that was so, the case for an injunction was at least as strong as a case based on an exclusive jurisdiction clause. I do not necessarily accept this. In general, if parties agree an exclusive jurisdiction clause they should be kept to their bargain; if, as here, the exclusive jurisdiction of the English courts is imposed by statute it can be said that the case for an injunction is not so strong, particularly where the statute has provided that an agreed exclusive jurisdiction clause is of no effect.

42. The converse of this problem arose in ***OT Africa Line v Magic Sportwear Corp. & others*** [2005] 2 Lloyd Rep. 170 where a cargo claim under a bill of lading containing an English law and exclusive jurisdiction clause was made in Canada relying on Canadian legalisation which allowed such a claim to be made there in spite of the clause. This court granted an anti-suit injunction to restrain the Canadian proceedings on the ground that the parties should be kept to their English law bargain. This is an illustration of the court giving full effect to party autonomy which under Article 23 of the Regulation it is required to do, but under Articles 20 and 21 it cannot. We are in the latter position: we cannot give effect to the exclusive New York jurisdiction clause.

43. Doing nothing is not an option in my judgment. The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction. The only way to give effect to the English claimants' statutory rights is to restrain those proceedings. A multinational business must expect to be subject to the employment laws applicable to those they employ in different jurisdictions. Those employed to work in the MM group in London who are domiciled here are entitled to be sued only in the English courts and to be protected if that right is not respected. There is nothing to prevent MMC and GC or any other company in the MM group from enforcing their rights under the bonus agreements here.

44. For these reasons I think we should allow this appeal and grant an anti-suit injunction (the terms of which I hope can be agreed) to restrain the New York proceedings.

Lord Justice Longmore: I agree

Lord Justice Lloyd: I also agree

GRAHAM DUNNING Q.C. and CLAIRE BLANCHARD (instructed by Elborne Mitchell) for the Appellants/Claimants
MURRAY ROSEN Q.C. (of HERBERT SMITH) and ANDREW LENON Q.C. (instructed by Herbert Smith) for the Respondents/Defendants