

**JUDGMENT : MR JUSTICE WALKER:** Commercial Court. 4<sup>th</sup> April 2008

1. This is an application for declaratory and injunctive relief. The claimant, which I shall refer to as "the Club", is a mutual protection and indemnity insurer. The defendant, which I shall refer to as "Sulpicio", was for many years a member of the Club. Sulpicio has brought a claim against the Club before the Makati City Regional Trial Court in the Philippines. The Club says that Sulpicio's claim cannot be brought other than by way of arbitration in London.
2. Mr Robert Bright QC and Miss Jessica Sutherland appear today on behalf of the Club. There is no appearance on behalf of Sulpicio. As I shall explain, however, I am satisfied that Sulpicio has had proper notice of today's hearing. In accordance with the duties of advocates where one side only has attended before the court, the legal team for the Club has drawn my attention to such points as appear to them to be points which might reasonably be advanced on behalf of Sulpicio. That has been done both orally and in a skeleton argument lodged in support of the Club's application. In this judgment I shall make reference to headings and contentions that are found in that skeleton argument. I stress that I have applied my own independent judgment in considering all points raised by the Club and in endeavouring to ascertain what answer might be made to those points by Sulpicio.

**The background to the Club's application**

3. Sulpicio is a Filipino company which operates a fleet of ferries and general cargo vessels. Its vessels were entered with the club on an annual basis. In June 2004, during the Club's 2004/05 year of cover, the vessel "Princess of the Pacific" ran aground and was subsequently declared a constructive total loss. In July 2005, during the Club's 2005/06 year of cover (which began on 20 February 2005) another vessel, "Princess of the World" suffered a serious fire and was also declared a constructive total loss.
4. After investigating those incidents, the Club declined cover for the claims arising out of the fire on board the "Princess of the World". It also terminated the entry of all Sulpicio's vessels with effect from 1 December 2005. Both these actions were said to be justified because there had been material breaches of the rules of the Club.
5. I have, in the material before me, a copy of the certificate of entry and acceptance in relation to Sulpicio's vessels for the 2005/06 year of cover. On its face, the certificate states that there has been an acceptance by the Club of Sulpicio's proposal for entering the relevant ships in class 1, protection and indemnity in accordance with "... the Rules from time to time in force...". As I shall explain later, the Rules were sent to members and it is those Rules which are said by the Club to have been broken by Sulpicio. The stance taken by the Club has led to disputes between it and Sulpicio, including a dispute as to whether the Club is liable to cover Sulpicio for such sums as Sulpicio may have to pay to third parties as a result of the fire on board the "Princess of the World".
6. The claim by Sulpicio against the Club was lodged in the Makati City Regional Trial Court on 12 July 2007. In summary, the claim involves two main assertions. The first main assertion is that the Club is obliged to "honour, recognise and effectuate" the contract for P&I insurance for the vessel M/V "Princess of the World" and to cover all P&I claims arising thereunder. The second is that the Club has "committed fraud" in terminating cover in respect of the "Princess of the World" and the other vessels in Sulpicio's fleet and that Sulpicio is entitled to "moral damages".
7. An amended complaint by Sulpicio in those proceedings specifically identifies in paragraph 7 the contract between Sulpicio and the Club in the certificate of entry that I have quoted earlier in this judgment.
8. On 31 July 2007, the Club lodged a motion in the Makati City Regional Trial Court to dismiss Sulpicio's claim or to refer it to arbitration in London. In lodging that motion, the Club has made it clear that it does not submit to the jurisdiction of the Filipino court. The hearing of the Club's motion has not yet occurred.

**The arbitration proceedings**

9. On 31 July 2007 the Club commenced arbitration proceedings in London, appointing Mr Gavin Kealey QC as its arbitrator and calling upon Sulpicio to appoint its own arbitrator. Sulpicio did not do so. The result was that Mr Kealey was appointed as sole arbitrator pursuant to section 17 of the Arbitration Act 1996 ("the 1996 Act"). The Club's claim submissions in the arbitration were served on Sulpicio by email on 1 April this year.

**The application in this court**

10. The present application was begun by an arbitration claim form dated 29 August 2007. On 12 September 2007, the Club sought and obtained permission to serve the claim form out of the jurisdiction in the Philippines. It proved difficult to effect service by standard means and the Club therefore sought permission to effect service by alternative methods. Permission was granted by an order of Cooke J dated 16 Jan 2008. That order also extended the period for serving the claim form. The order permitted service by four alternative methods. One such method was by hand delivery to Sulpicio's office building. I am satisfied from the evidence before me that this was effected on 31 January 2008 by Mr Mungandayao, an attorney of Del Rosario and Del Rosario.
11. Paragraph 2 of the order of Cooke J provided that "in these circumstances service would be deemed effective two days later". It follows that under the procedural rules of this court, Sulpicio was served on 2 February 2008. Sulpicio then had 21 days in which to acknowledge service under paragraph 3 of Cooke J's order. Sulpicio has not acknowledged service. It ought to have acknowledged service no later than 23 February this year; over a month has now elapsed without any action being taken by Sulpicio to file its acknowledgement of service here.

**The order dated 19 March 2008 for interim anti-suit relief**

12. On 18 March 2008 Sulpicio was informed by fax and email that an urgent application would be made in this court the following day. It was explained that urgency arose from a concern that the Makati City Trial Court might determine a motion by Sulpicio in the Easter vacation. Despite notice being given in this way, Sulpicio took

no part in the application which was made by the Club the following day. The application was granted by Field J. His order, dated 19 March 2008, restrained Sulpicio from pursuing proceedings in the Philippines and elsewhere until after "the return date" or until further order of the court.

13. Field J's order stipulated that the return date was today, 4 April 2008, and that what should happen on the return date was a "further hearing in respect of this order and in respect of the claimant's claim...". I am satisfied that it was apparent from Field J's order that if Sulpicio wished to oppose the grant of the relief sought in the Club's arbitration claim form, then it would need to arrange to make representations to this court for the purposes of the hearing today.
14. The order of Field J was sent to Mr Carlos Go, the Executive Vice President and Chief Executive Officer of Sulpicio, by fax and email. Sealed orders were sent to Sulpicio and its attorney, Mr Inting but courier on 20 March 2008. The copy sent to Mr Inting, Sulpicio's attorney, was not, however, delivered to him. The courier company was told that he was no longer to be found at the address 415 San Fernando Street, Binondo, Manila. However, that is the address given for Mr Inting in the documents filed by Sulpicio in the proceedings in the Makati City Trial Court.
15. Those methods of notification of the order were all methods permitted by the order itself. I am satisfied that Sulpicio has had ample notice of the Club's arbitration claim form, of the order made by Field J and of the fact that the Club would be seeking further relief from the court today.

#### **Questions as to this Court's extraterritorial jurisdiction**

16. Sulpicio has not been served within England and Wales. This court has jurisdiction to grant orders against Sulpicio only if the Civil Procedure Rules permit the arbitration claim form to be served out of the jurisdiction. As indicated earlier in this judgment, orders permitting service out of the jurisdiction were made on 12 September 2007 and 16 January 2008.
17. There were two main bases on which the Club said that extraterritorial jurisdiction arose. The first was that the claim fell within provisions relating to arbitration in CPR 62.5(1). The second was that the Club's claim arose in respect of a contract expressly governed by English law. At the stage that the orders of September 2007 and January 2008 were made, this court was proceeding upon the basis that there was a good arguable case of jurisdiction under the provisions that I have mentioned. Later in this judgment, I shall return to examine, in case it is relevant, the question whether the grounds relied upon by the Club in that regard are grounds which are established not merely on the basis of a good arguable case, but rather have been proved to my satisfaction by the evidence lodged by the Club.

#### **The essence of the Club's claim**

18. The first stage of the argument advanced by the Club is that the contract between it and Sulpicio contained an arbitration clause. The second stage asserts that the claim made by Sulpicio against the Club falls within that arbitration clause. The third stage asserts that this court accordingly has jurisdiction to grant, and as a matter of discretion ought to grant, the relief sought by the Club.

#### **The first stage: the arbitration clause**

19. I have before me evidence as to the content of the Club rules in the relevant years of cover. They included rule 47. So far as material for present purposes, that rule provided:
  - i *In the event of any difference or dispute whatsoever, between or affecting a Member and the Club and concerning the insurance afforded by the Club under these rules or any amounts due from the Club to the Member or the Member to the Club, such difference or dispute shall in the first instance be referred to adjudication by the Directors ...*
  - ii *If the Member does not accept the decision of the Directors, or if the Managers, in their absolute discretion, so decide, the difference or dispute shall be referred to the arbitration of three arbitrators, one to be appointed by each of the parties and the third by the two arbitrators so chosen, in London. The submission to arbitration and all the proceedings therein shall be subject to the provisions of the English Arbitration Act, 1996...*
  - vi *These rules and any contract of insurance between the Club and the Member shall be governed by and construed in accordance with English law..."*
20. In the Filipino proceedings, Sulpicio has lodged a document entitled "Manifestation with Omnibus Motion". Section II of this document deals with a contention that the arbitration agreement alleged by the Club is "inexistent". Various contentions are made in this regard. It is said that Sulpicio did not sign any arbitration agreement. It is asserted that rule 47 lacks binding effect "not having been made known to plaintiff and not conformed to by it". An assertion is made that it is for the Club to prove that it actually furnished Sulpicio with a copy of the rule book and made Sulpicio conform to it. It is added that the certificate does not mention any arbitration agreement. As to the reference to "the Rules from time to time in force", a rhetorical question is asked: what "Rules"? It is said that it cannot be proven that Sulpicio had knowledge of the Rules and cannot be proved that it subscribed to the Rules at the pertinent time. The bottom line is said to be that "these alleged "Rules" containing the alleged arbitration agreement do not exist".
21. As to those assertions, however, the first point to note is that Sulpicio accepts that its vessels were entered with the Club. That is the whole basis for Sulpicio's claim in the Makati City Trial Court. As is apparent from my summary of section 2 of the Omnibus Motion, Sulpicio acknowledges that entry was achieved through the issue of the

Certificate and further acknowledges that the Certificate refers to "the Rules". I am satisfied from the evidence before me that copies of the Rules in force in each year were sent annually to each member, including Sulpicio.

22. In addition, the witness statements from the agents of the Club in the Philippines established not merely that Sulpicio received the Rules, but that it relied on the Rules in correspondence. Sulpicio states in its amended complaint that it has been a member of the Club for 20 years. In these circumstances, I consider it to be clearly established that Sulpicio was aware that the insurance provided by the Club was subject to the Rules, including the provisions of rule 47.

**Stage two: is Sulpicio's claim within the arbitration clause?**

23. Rule 47(vi) has the effect that this question is governed by English law. In its omnibus motion, Sulpicio sets out in section I assertions to the effect that the arbitration clause does not cover Sulpicio's claim. The first point is that Sulpicio seeks to compel the Club to honour its cover of Sulpicio's vessels. As a matter of English law that does not assist Sulpicio. A claim for specific performance, and in particular for the honouring of cover, is a claim which is ordinarily within the jurisdiction of an arbitrator. Sulpicio adds, however, that its claim is "anchored upon ... bad faith amounting to fraud and/or oppression ... the defendants practised fraud and deception".
24. This is said to go to "*the core of the execution of the P&I cover itself.*" It is said that Sulpicio's complaint repudiates the acts of the Club in unlawfully refusing to honour its obligation to cover the vessel and in "*kicking out*" Sulpicio's entire fleet. That is said to require the interpretation of laws and jurisprudence which is necessarily the function of the courts of law. As a matter of English law, these assertions, and in particular propositions of law which are cited, do not assist Sulpicio.
25. The propositions cited by Sulpicio may have some relevance in a case where it is said that fraud, oppression or deception vitiated the making of the contract relied upon. It is plain that this is not a case in which Sulpicio says that its contract with the Club was vitiated. Thus I consider it clearly established that the dispute between Sulpicio and the Club at the very least includes a contractual issue, which in the ordinary course would fall within the scope of an arbitration agreement. I note, however, that Sulpicio's claim would be capable, or may be capable, of being expressed in terms other than contract. Whether they be assertions of fraud, oppression, deception or something else, however, it is apparent to me that all such claims are nevertheless within the wide terms of the arbitration clause in rule 47. That rule refers to "*any difference or dispute whatsoever ... concerning the insurance afforded by the Club under these Rules.*"
26. It is well established as a matter of English law that words of that kind will embrace non-contractual claims: see the decision of the Court of Appeal in *Fiona Trust & Holding Corporation v Privalov* [2007] EWCA Civ 20, the decision of the House of Lords in *Feely Shipping Co Ltd v Premium Nafta Products Limited* [2007] UKHL 40 and the decision of the High Court in *Asgar v Legal Services Commission* [2004] EWHC 1803 (Ch). Accordingly, I conclude that the Filipino proceedings have been commenced in clear breach of the arbitration agreement in rule 47.

**Extraterritorial jurisdiction: analysis**

27. It follows from the conclusions reached above that I am satisfied that there was in fact between the parties an arbitration agreement falling within CPR 52.5(1)(c) and that this court has jurisdiction in that regard, both because the claim affects that arbitration agreement and because the seat of the arbitration is in London. It also follows that I am satisfied that extraterritorial jurisdiction arose under CPR 6.20(5)(c), the Club's claim being in respect of a contract expressly governed by English law under rule 47(vi).

**Stage three: should the relief sought be granted?**

28. A permanent anti-suit injunction is sought under section 37 of the Supreme Court Act 1981. I note at this point that where an interim injunction is sought in relation to arbitration proceedings, various restrictions are imposed by section 44 of the 1996 Act. However, it is clear that those restrictions do not come into play when one is considering a permanent anti-suit injunction: see *Wellex AG v Rosa Maritime Limited* [2003] 2 Lloyd's Rep 509 at paragraph 36 and paragraph 40. Further, it is clear from the reasoning in *Vale do Rio Doche Navigatio SA v Shanghai Val Steal Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1 that there is nothing in section 1 of the 1996 Act which prohibits intervention on the part of this court in the present circumstances.
29. In general, before granting an anti-suit injunction under section 37, the court must be satisfied of one or both of two elements. The first is that the pursuit of legal proceedings abroad infringes or would infringe a legal or equitable right of the Club. The second is that pursuit of the proceedings abroad is or would be unconscionable.
30. I am satisfied that both these elements are present in this case. For the reasons I have given earlier, the agreement between the parties included rule 47. The claim made in the Philippines is within the scope of the arbitration agreement and by pursuing that claim Sulpicio is infringing a legal right of the Club. Moreover, as observed by Colman J in *A v B* [2007] 1 Lloyd's Rep 237, the parties' choice of an arbitral seat is analogous to an exclusive jurisdiction clause in favour of the English court's supervisory jurisdiction of the arbitration, and the natural consequence of this selection of the arbitral seat is that the validity of the arbitration agreement should be determined by the supervisory court. Accordingly, Sulpicio's conduct is clearly unconscionable. The natural forum for this dispute is England, given the terms of the rules providing for English law and London arbitration. The court plainly has jurisdiction to grant the injunctive relief that is sought. As a *matter* of discretion it should grant such an injunction when the ends of justice require it. Applying well established principles set out in *Aggeliki Charis Companier Maritima SA v Pagnan SpA* [1995] 1 Lloyd's Rep 87, an injunction ought to be granted provided that it is sought promptly and before the foreign proceedings are too far advanced.

31. The position overall is that Sulpicio has declined to advance any reasons before this court in opposition to the application by the claimant. The omnibus motion, however, provides a clear indication of what it would say. I have given reasons already for rejecting what has been advanced in sections I and II of the motion. Further points were put forward in sections III and IV. Here it was said that the Filipino proceedings had been brought against two parties who were not parties to the arbitration agreement and that one of those parties had filed an answer to the amended complaint. However, the injunction sought by the Club will not prevent Sulpicio from pursuing its claims in the Philippines against those parties if it wishes to do so and if the Filipino court permits it.
32. I am satisfied that there is no strong reason against the grant of an injunction that has been or could be advanced by Sulpicio. Damages would not be an adequate remedy. Litigation in the Philippines would be a very different procedure from that which the parties contracted for in terms of arbitration in London.
33. The arbitrator could, under English law, himself grant an anti-suit injunction. However, he is not available until next week. Even if he were available, Sulpicio insists that he has no jurisdiction and in those circumstances I consider it plainly desirable that this court deal with the matter. The Club commenced its arbitration in London against Sulpicio promptly. It issued the application in this case promptly. It cannot be said that there is any relevant delay on the part of the Club.
34. The other main head of relief sought is a declaration. I consider that it is just and convenient for this court to decide and determine the scope of the arbitration agreement in accordance with the approach of the Court of Appeal in *Through Transport v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67. It follows from the analysis earlier in this judgment that the propositions set out in the two declarations sought by the Club are established. It is appropriate that I should grant those declarations.
35. The remaining relief, save as to costs, follows as a matter of course. I will hear submissions on costs.

MR R BRIGHT PC and MISS J SUTHERLAND appeared on behalf of the Claimant  
The Defendant did not attend and was not represented