BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claims No. BVIHCV2005/0264 & BVIHCV2005/0265 (consolidated)

IN THE MATTER OF AN APPLICATION IN RELATION TO PROCEEDINGS IN ANOTHER JURISDICTION (Rule 8.1(6)(b)

AND

IN THE MATTER OF AN APPLICATION FOR ANTI-SUIT INJUNCTIVE RELIEF

BETWEEN

(1) FINECROFT LIMITED
(2) WINFAIR LIMITED

Applicants

And

LAMANE TRADING CORPORATION

Respondent

Appearances:

Mr. Mark Howard QC with Mr. John Alan Maclean and Mr. Mark Forte for the First Applicant
Mr. Michael J. Fay for the Second Applicant
Mr. Jack Husbands with Mr. Jerry Samuel for the Respondent

2005: November 30
2006: January 06

JUDGMENT

[1] HARIPRASHAD-CHARLES J: Finecroft Limited and Winfair Limited ("the Applicants") seek an "anti-suit injunction" against Lamane Trading Corporation ("Lamane") to restrain Lamane from taking any steps to prosecute or continue the proceedings it commenced against both Applicants in New York, Russia and Cyprus. Lamane has initiated these proceedings in these jurisdictions in what is alleged to be a flagrant breach of an

agreement to arbitrate in London. Lamane has also commenced arbitration proceedings in the London Court of International Arbitration (the "LCIA").

[2] Stripped to its bare essentials, Lamane's case is that the arbitration clause in the Trust Deed which is at the heart of the dispute between the parties is governed by Cypriot Law and all the connecting factors are governed by the laws of Cyprus. Lamane asserts that there is nothing to connect this case to the BVI except for the fact of the incorporation of Lamane in this Territory. Lamane next asserts that these applications should be made in some other forum but not in the BVI and as such, the BVI Court should not exercise the jurisdiction which the Applicants are seeking.

The parties

[3] Both applicants, Finecroft and Winfair are incorporated under the laws of Cyprus. Their registered office is at Themestokli Dervi, Elenion Building, 5 Dervis Street, Cy PC Nicosia, Cyprus.

[4] Lamane is a Company incorporated in the British Virgin Islands. Its registered office is at Pasea Estate, Road Town, Tortola, British Virgin Islands.

The proceedings to date

[5] On 16 November 2005, both Applicants made applications without notice seeking certain injunctive relief. I granted, among other things, an interim injunctive order restraining Lamane until 30 November 2005 (the date fixed for the inter partes hearing) from continuing with the substantive proceedings in New York, Russia and Cyprus ("the Order").

[6] The interim order was personally served on Lamane on 16 November 2005 together with the applications seeking final relief. Lamane's solicitors were immediately given notice of the making of the Order. A copy of the sealed order was attached to that fax. An amended translation into Russian was served by fax on 17 November 2005.

[7] By facsimile letters dated 18 November and 21 November 2005 respectively, solicitors for Finecroft as well as Winfair sought confirmation that Lamane will comply with the Order of this Court but no such confirmation has been forthcoming. The only response from Lamane's solicitors has been letters dated 22 and 23 November 2005 none of which provided any substantive response.

[8] From 16 to 24 November 2005, Lamane appeared to have done very little, if anything at all, in terms of evidence in reply to the Applicants' evidence. Then a chain of activity ensued. On 25 November 2005, Mr. Jack Husbands acting as Counsel for Lamane wrote to the Registrar of the High Court seeking to advance the hearing date from 30 November to 28 November 2005 for the hearing of his oral application to discharge the Order made without notice on 16 November 2005. An unsigned draft of the First Affidavit of Yiannakis Papatheodorou as well as a compendium of exhibits accompanied the letter. Between 9.40 a.m. on 28 November and 11.21 a.m. on 29 November 2005, a splurge of affidavits and exhibits were filed. Needless to say, the Applicants were served with all of these documents at the eleventh hour. This triggered some last minute filing of affidavits in response by the Applicants; in particular, the affidavit of Mr. Gerald Steven Paul Mitchard, solicitor of the Supreme Court of England and more significantly, the First affidavit of Mr. Polyvios G. Polyviou, the Cypriot lawyer.

[9] On 30 November 2005, Mr. Husbands sought an adjournment of the hearing of the application for final relief. Learned Counsel complained resentfully about the late receipt of the Applicants' affidavits in reply particularly the affidavit of Mr. Polyviou. At the end of the day, the Court concluded that Lamane was responsible for the unhappy state of the evidence and proceeded to hear the present consolidated application for an anti-suit injunction.

The Trust Deed

[10] On 4 March 2004, Finecroft, Winfair, Lamane and Chrysses Demetriades & Co. entered into a trust deed (the "Trust Deed"). The purpose of the Trust Deed was to regulate the conduct of Finecroft, Winfair and Lamane in respect of interests in shares relating to an

ultimate investment in two Russian companies involved in the titanium industry, OAO VSMPO ("VSMPO") and OAO Avisma ("Avisma") and to establish a trust in respect of the same (the "Trust"). Chrysses Demetriades & Co. was made trustee of the Trust (the "Trustee").

(i) Submission to arbitration

[11] Clause 35 of the Trust Deed deals with governing law and submission to arbitration. Clause 35.1 provides that the Trust Deed shall be governed by and construed in accordance with Cypriot law. Clause 35.2 contains the following provision:

> "Any disputes or differences in connection with this Trust Deed or touching upon any breach of the provisions hereof, including, without prejudice to the generality, the issues of the validity of this Trust or termination thereof or the rights and remedies of the parties hereto, shall be referred for final settlement to the International Court of Arbitration in London in accordance with its rules and regulations. The decisions of the said Court of Arbitration shall be final and binding on the Parties and shall be implemented in any jurisdiction. The place of arbitration shall be London, the language of the proceedings shall be English language and the applicable law shall be the governing law provided in clause 34.1 above."

[12] Pursuant to clause 35.2 of the Trust Deed, the parties expressly agreed that all disputes and differences between the parties in relation to the Trust Deed or touching upon any breach of it, would be finally resolved in arbitration proceedings in London at the London Court of International Arbitration.

(ii) Mutual Buyout Option

[13] Clause 15 of the Trust Deed contains Mutual Buyout Option provisions.[1] In summary, this clause empowers a beneficiary under the Trust to make the other beneficiaries an irrevocable offer to sell its interest in the Trust at a certain price per share. The effect of this irrevocable offer is that the beneficiary making the offer is entitled to purchase the other beneficiaries' interest in the Trust at the same price per share (pursuant to clause 15.3 of the Trust Deed) unless the offerees are able to accept the irrevocable offer within a 90-day period (pursuant to clause 15.2 of the Trust Deed). It is commonly referred to as

[1] TB 2/F/1 page 35

"Russian Roulette" because you take a chance. If a party offers its shares to another party at a certain price, that other party shall either purchase such shares or sell the shares owned by it at an equal price. For example, if A puts forward a low bid, A hopes that B would be unable to come up with the money and so A could buy B out on the cheap. That was exactly what Lamane was attempting to do.

[14] On 28 April 2005, Lamane made an irrevocable and unconditional buyout offer (the "Buyout Offer") to sell all of its shares in the Russian Undertakings and in the Trust pursuant to clause 15 of the Trust Deed for an aggregate sum of approximately US$148.6 million. By letter dated 25 July 2005, Finecroft and Winfair accepted Lamane's offer to sell as set out in clause 15.2 of the Trust Deed. On 26 July 2005, the Trustee confirmed that approximately US$148.6 million had been credited to the Trust Account representing payment in full of Lamane's Respective Interest under the Trust.

[15] During the Mutual Buyout Option process and after Finecroft and Winfair had accepted Lamane's irrevocable and unconditional offer to sell, Lamane raised a number of different allegations in an attempt to persuade the Trustee to suspend or stop the Mutual Buyout Option from proceeding. On 25 July 2005, Lamane wrote to the Trustee stating that Finecroft and Winfair have violated the terms and conditions of Clause 15 of the Trust Deed and thereby requesting the trustee not to take further action.

[16] The next day, Lamane took an extraordinary turn. It says that by clause 15.2.1 of the Trust Deed, Finecroft and Winfair should have deposited an amount equal to 25% of the total Buyout Purchase Price for their respective interest and not the total Buyout Purchase Price and by doing so, they have violated the provisions of clause 15 of the Trust Deed. On 27 July 2005, the Trustee replied. In a nutshell, the Trustee stated that there was nothing wrong with the payment of the full price. Still on its fishing expedition, Lamane changed track and tack. Lamane says that there are some unpaid dividends due on shares, currently kept by ZAO "Investment Company Troika Dialog" in the name of Osengo Investment Limited and that provides a sufficient reason to request a suspension of the Mutual Buyout Procedure until final resolution of the matter. Finecroft and Winfair have

confirmed that Lamane is entitled to the dividends and have expressed their readiness to effect payment to the Trustee.

[17] Then, on 27 July 2005, Lamane launched a new line of attack which essentially features in the various litigations. The letter, written to the Trustee states:

> "We would like to put you on notice that we have reasonable grounds to believe that, while securing financing for the buyout procedure, Finecroft Limited and Winfair Limited have arranged and/or procured for an Encumbrance (as this term is defined in the Trust Deed) of their, and possibly our, beneficial interest and/or share in the Trust in favour of third parties; contrary to the provisions of the Trust Deed.
>
> As you understand this constitutes a breach of the terms of the Trust Deed and precludes you from continuing with the mutual buyout procedure. In addition, in accordance with the provisions of the Trust Deed this fact constitutes a dispute in the meaning of Clause 35.2 and should be referred to arbitration in accordance with the provisions of Clause 35.2 of the Trust Deed (emphasis added).
>
> As a result, we hereby call upon you to suspend the buyout procedure, especially with respect to the transfer of our Respective Interest (as this term is defined in the Trust Deed) in Osengo Investments Limited and to refer this dispute to arbitration (emphasis added); and in case you have any doubts please obtain external legal advice to this effect."

[18] At this point in time, it was plain to Lamane that this dispute should be referred to arbitration. So much so, that on 28 July 2005, Lamane called on the Trustee to suspend the Buyout Procedure and "to refer this dispute to arbitration." In addition, Lamane implored the Trustee to seek external legal advice.

[19] Although the Trustee firmly rejected the allegations, it nevertheless sought and obtained independent advice from the Law Offices of Tassos Papadopoulos & Co. Independent legal advice confirmed the Trustee's own view, as the Trustee explained in its letter of 28 July 2005 to Lamane.

[20] Consequently, under cover of a letter dated 2 August 2005, the Trustee issued the Re-Designation Certificate confirming the Transfer of Lamane's Respective Interest to Finecroft and Winfair.

(iii) The LCIA Arbitration

[21] By letter dated 17 October 2005 to the LCIA, DLA Piper Rudnick Gray Cary, a law firm acting on behalf of Lamane issued a request for arbitration against Finecroft and Winfair in accordance with the arbitration agreement contained in clause 35.2 of the Trust Deed. The letter stipulates, among other things, the following:

> "On 28 April 2005, [Lamane] offered to sell its Respective Interest to [Finecroft] and [Winfair] pursuant to Clause 15. On 25 July 2005, [Finecroft] and [Winfair] accepted [Lamane's offer] and deposited US$148,591.865 representing almost the total Buyout Purchase price in accordance with Clause 15. The Buyout was deemed completed by the Trustee on 2 August 2005 with the issue of a Re-Designation Certificate in favour of [Finecroft] and [Winfair].
>
> [Lamane] contends that [Finecroft's] and [Winfair's] financing of the Buyout was procured by creating and/or purporting to create an Encumbrance on shares in violation of the restrictions on transfer contained in clauses 4.4, 11 and 17 of the [Trust Deed] and that the purported Buyout and Transfer of [Lamane's] Respective Interest were therefore void.
>
> Against that background, [Lamane] seeks the following relief:
>
> 1) A declaration that the Transfer of [Lamane's] Respective Interest to [Finecroft] and [Winfair] was void.
>
> 2) An Order restoring [Lamane's] Respective Interest to [Lamane].
>
> 3) Damages
>
> 4) Other relief."

[22] On 18 November 2005, Finecroft served its Response in the LCIA Arbitration pursuant to Article 2.1 of the LCIA Rules. Winfair also served its Response on the said day.[2] The letter from the Deputy Registrar of the LCIA confirms that both parties have served their Response. However, despite the parties' clear agreement to arbitrate, and despite the commencement by Lamane of arbitration proceedings in the LCIA, Lamane has commenced substantive proceedings in the Courts of New York, Russia and Cyprus against a number of defendants including Finecroft and Winfair. The Applicants assert that insofar as these proceedings are brought against Finecroft and Winfair, they are brought in flagrant breach of the arbitration agreement.

[2] 1/D/7 pages 182 –183.

The legal proceedings

[23] Despite the commencement by Lamane of an LCIA Arbitration, Lamane has challenged the transfer of its interest in the Trust to Finecroft and Winfair in each of the following proceedings, which name Finecroft and Winfair as Defendants.

a) Proceedings filed in the Arbitrazh Court of the Sverdlovsk Region, Russia on 6 October 2005, numbered A60-33801/2005-S4 (the "Sverdlovsk Proceedings");

b) Proceedings filed in the Supreme Court of the State of New York, County of New York, USA on 6 October 2005, numbered 05603581 (the "New York Proceedings"); and

c) Proceedings filed in the Nicosia District Court, Nicosia, Cyprus on 10 October 2005, numbered 7627/05 (the "Cyprus Proceedings").

(i) The "Sverdlovsk Proceedings"

[24] Lamane commenced proceedings in the Arbitrazh Court of the Sverdlovsk Region of Russia on 6 October 2005. This Court is the commercial state court in Sverdlovsk and is wholly unrelated to any arbitration institution. On 21 October 2005, documents relating to these proceedings were delivered to PricewaterhouseCoopers in Cyprus in an attempt to effect service on Finecroft. The relief sought is:

> "1. That the buyout by Finecroft Limited and Winfair Limited of shares held in trust from Lamane Trading Corporation be invalidated.
> 2. That bilateral restitution be applied.
> 3. That the interested party transactions involving loans to [Mr. Tetyukhin] and [Mr. Brecht]… be invalidated."

[25] It is crystal clear that the relief sought in these proceedings against Finecroft and Winfair falls directly within the ambit of the arbitration agreement. The second and third heads of relief depend on the first which involves Lamane establishing that there was a breach of the Trust Deed by Finecroft and Winfair.

(ii) The "New York Proceedings"

[26] On 6 October 2005, Lamane also commenced proceedings in the Supreme Court of the State of New York. The essence of the claim made by Lamane is that, in arranging financing for the purchase of Lamane's interest in the Trust, Finecroft and Winfair breached the terms of the Trust Deed prohibiting certain encumbrances on the shares in VSMPO-Avisma. The relief Lamane seeks is all concerned with the Trust and the alleged breach of the Trust Deed.

[27] At the root of the New York Proceedings is an allegation of breach of the Trust Deed. This is evident from the very first page of Lamane's Complaint, under the heading "*Nature of Action"*, which provides:

> "In this action, Lamane Trading Corporation ("Lamane") seeks injunctive relief, restitution and damages arising out of the defendants' unlawful and deceptive conduct in violation of their fiduciary obligations and the terms of an agreement among and between the parties. Lamane, Finecroft Limited and Winfair Limited were parties to an agreement that consolidated their respective holdings in the largest titanium production company in the world, OAO VSMPO-Avisma, located in Russia. Unbeknownst to Lamane, and in clear violation of the parties' agreement, Finecroft and Winfair…encumbered and/or transferred their interest in VSMPO-Avisma and thereby were able to obtain funds they then used to buy-out Lamane's interest's in VSMPO-Avisma under the mutual buy-out provision of the contract…But for this undisclosed financing that came about because Finecroft and Winfair breached the agreement and their fiduciary obligations and pledged their interests, Lamane would not have been bought out…"

[28] When one scrutinizes the Complaint, the same point is apparent elsewhere. [3] The relief sought by Lamane in these proceedings is to unwind the transfer of its interest in the Trust brought about as a result of the Mutual Buyout Option. The prayer for relief seeks an order for the restitution of Lamane's shares to the Trustee to be held on trust for Lamane. In addition, Lamane is seeking damages and an injunction preventing the defendants from disposing or otherwise dealing with their shares in VSMPO-Avisma.

[3] See paragraphs 33,38 and 39 of the Complaint.

[29] It seems clear to me that the New York proceedings against Finecroft and Winfair have been brought contrary to the parties' agreement as set out in clause 35.2 of the Trust Deed.

(iii) The "Cyprus Proceedings"

[30] On 10 October 2005, Lamane filed the Cyprus Proceedings against, amongst others, Finecroft and Winfair. Lamane made an application for interim relief which was refused. These proceedings have not been served on Finecroft or Winfair.

[31] From the court records, it appears that Lamane is seeking a declaration that the transfer of the shares by the Trustee to Finecroft and Winfair is null and void. Lamane is also seeking damages for breach of contract, unlawful intervention, unlawful interference, conspiracy, fraud and/or unjust enrichment.

[32] In my judgment, the matters complained of in these proceedings are matters that ought properly to be referred to arbitration in accordance with clause 35.2 of the Trust Deed.

[33] On 24 October 2005, Lamane commenced separate proceedings in Cyprus seeking interim freezing relief purportedly in support of the London arbitration proceedings (the "Ancillary Cyprus Proceedings"). These proceedings are ongoing. It appears that Lamane has also made an unsuccessful *exparte* application in these proceedings.

The issue

[34] The sole issue for determination by this Court is not the merits of the claims advanced by Lamane in contending whether the acquisition was valid or invalid but whether Lamane is entitled to have that issue resolved as against Finecroft and Winfair otherwise than in the LCIA proceedings.

The applicable legal principles

[35] The main thrust of Mr. Husbands' submissions is that there is nothing to connect this case to the BVI other than the fact that Lamane is incorporated here and that the BVI Court

should not exercise jurisdiction based on the affidavit evidence. Mr. Husbands dubbed this case a "dressed-up" forum case; skillfully dressed up as a contract case." As Mr. Howard QC correctly pointed out, Finecroft and Winfair have no choice if they are going to enforce the arbitration agreement but to approach this court which has personal jurisdiction over Lamane since it is a company incorporated in this Territory.

[36] Learned Queen's Counsel Mr. Howard appearing for Finecroft submits that Rule 32 (4) of Dicey & Morris on Conflict of Laws deals with jurisdiction agreements. It reads:

> "An English Court (by extension BVI Court) may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court in breach of a contract to refer disputes to an English (or *semble*, another foreign) court."

[37] In the instant case, the BVI Court has personal jurisdiction because Lamane is a BVI Company and what Finecroft and Winfair are attempting to do is to restrain Lamane from proceeding in the Courts of New York, Russia and Cyprus in flagrant breach of an arbitration agreement.

[38] Dicey & Morris at 12-128 deals with injunctions to restrain foreign proceedings in breach of arbitration agreement and this jurisdiction is of fairly ancient vintage. The English court has, since at least 1911,[4] exercised a jurisdiction *in personam* to restrain by injunction foreign proceedings brought in breach of an agreement to refer disputes to arbitration. The injunction is granted on the premise that without it the claimant will be deprived of its contractual rights (the right to have disputes settled by arbitration) in a situation in which damages are clearly an inadequate remedy. The Angelic Grace[5] is authority for the proposition that where one party brings foreign proceedings in breach of contract, the English courts will grant an anti-suit injunction to restrain the breach as long as the application is made promptly and before the proceedings are too far advanced. At page 96 of the judgment, Millett LJ said:

> "In my judgment, the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great

[4] Pena Copper Mines Ltd v Rio Tinto Co. Ltd. (1911) 105 L.T. 846 (C.A.).
[5] [1995] 1 Lloyd's Rep. 87

caution (Emphasis added). There have been many statements of great authority warning of the danger of giving an appearance of undue interference with the proceedings of a foreign Court. Such sensitivity to the feelings of a foreign Court has much to commend it where the injunction is sought on the ground of *forum non conveniens* or on the general ground that the foreign proceedings are vexatious or oppressive but where no breach of contract is involved. In the former case, great care may be needed to avoid casting doubt on the fairness or adequacy of the procedures of the foreign Court. In the latter case, the question of whether proceedings are vexatious or oppressive is primarily a matter for the Court before which they are pending. But in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them. (Emphasis added).

In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in *Continental Bank N.A. v Aeakos Compania Naviera S.A. [1994] 1 W.L.R. 588*. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case."

[39] Mr. Howard QC next submits that the case of Donohue v Armco Inc and others[6] sheds more light in this area. Mr. Husbands somewhat diffidently argues that Donohue has no applicability to the instant case. In Donohue, the House of Lords held that where the parties had bound themselves by an exclusive jurisdiction clause [7], effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it.[8] Whether a party could show strong reasons sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain would depend on all the facts and circumstances of the particular case.

[6] [2002] 1 All ER 749.
[7] The same principles apply to a breach of an arbitration clause.
[8] See also Turner v Grovit [2002] 1 WLR 107 which states that the basic rule in English law is that the English courts will ordinarily secure compliance with an exclusive jurisdiction clause unless the party suing in the non-contractual forum can show, the burden being on him, "strong reasons" for suing in that forum.

[40] Lord Bingham in what is regarded as the seminal speech in this area had this to say (at page 759, para 24):

> "If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word 'ordinarily' to recognize that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case" (Emphasis added).

[41] At page 768 (f-g), para 45, Lord Hobhouse of Woodborough said:

> "The position of a party who has an exclusive English jurisdiction clause is very different from one who does not. The former has a contractual right to have the contract enforced. The latter has no such right. The former's right specifically to enforce his contract can only be displaced by strong reasons being shown by the opposite party why an injunction should not be granted."

[42] In Atlanska Plovidba and another v Consignaciones Asturianas S.A. ("The Lapad") [9], Moore-Bick J said at page 115, paras 28 and 29:

> "An agreement to arbitrate has many similarities to an exclusive jurisdiction clause. In each case the parties have agreed upon their chosen tribunal and the location of any proceedings. The most authoritative statement of the proper approach to exclusive jurisdiction agreements is now to be found in the speech of Lord Bingham in *Donohue v Armco Inc., [2002] 1 Lloyd's Rep. 425.* One starts from the proposition that the court will ordinarily exercise its discretion by making whatever order is appropriate in the circumstances to secure compliance with the contract unless the other party can show strong reasons why it should not do so. It is clear from this and other cases, as Mr. Lord accepted, that factors which might ordinarily influence the Court when considering the question of *forum conveniens* are of little

[9] [2004] 2 Lloyd's Rep 109

> or no relevance where an exclusive jurisdiction clause is concerned. This principle applies equally to arbitration agreements and with even greater force to international arbitration agreements falling within the scope of the New York Convention for the reasons already stated by Mr. Justice Colman in *Toepfer international G.m.b.H. v Sociėtė Cargill France.* The parties have chosen their tribunal and the place of arbitration and neither of them can be heard to say that the agreement should not be enforced because it would be more appropriate, as things have turned out, to resolve the dispute in another manner or in another place."

[43] Both Mr. Howard QC and Mr. Michael Fay, Learned Counsel for Winfair emphasize that a good starting point of the legal principles to apply is that the Court will grant the injunction unless the other party can show strong reasons why it should not do so. Mr. Howard QC says that Lamane has yet to begin to do so. The fact that proceedings raising the same issues have already been commenced in another jurisdiction has not ordinarily been regarded as a strong reason for declining to make an order giving effect to an exclusive jurisdiction clause despite the inherent undesirability of multiple proceedings: see Akai Pty Ltd v People's Insurance Co. Ltd.[10]

[44] At paragraph 29 of the Judgment, Moore-Bick J. continues:

> "If it were otherwise, one party could deprive the other of the agreement simply by bringing proceedings in the forum of his own choice. Moreover, in the case of arbitration agreements falling within the New York Convention multiplicity of proceedings and the attendant risk of inconsistent decisions is not a ground for refusing to grant a stay."

[45] Mr. Husbands asserts that this court should refrain from exercising jurisdiction because it borders on serious problems of comity in that this court is being asked to issue an injunction to prevent another court in which the suit has been filed from dealing with the proceedings.

[10] [1998] 1 Lloyd's Rep. 90.

[46] It is plain from the judicial authorities that the appropriate relief where proceedings have been brought in breach of an arbitration agreement is an anti-suit injunction. In OT Africa Line Ltd v Magic Sportswear & Ors [11], Longmore LJ declared:

> "…Whatever country it is to the courts of which the parties have agreed to submit their disputes is the country to which comity is due. It is not a matter of an English court seeking to uphold and enforce references to its own courts; an English court will uphold and enforce references to the courts of whichever country the parties agree for the resolution of their disputes. This is to uphold party autonomy not to uphold the courts of any particular country.
>
> The corollary of this is that a party who initiates proceedings in a court other than the court, which has been agreed with the other party as the court for resolution of any dispute, is acting in breach of contract. The normal remedy for this breach of contract is the grant of an injunction to restrain the continuance of proceedings unless it can be shown that damages are an adequate remedy; but damages will not usually be an adequate remedy in fact, since damages will not be easily calculable and can indeed only be calculated by comparing the advantages and disadvantages of the respective *fora.* This is likely to involve an ever graver a breach of comity than the granting of an anti-suit injunction."

[47] Mr. Husbands warned that this Court must refrain itself from following what he seems to regard as an extravagant approach of the English Court. He submits that the exorbitant jurisdiction that the English courts are getting into is extreme and unnecessary and that this Court ought to take a completely different look at the extent of extraterritorial orders. Mr. Howard QC emphasizes that the English courts are not exercising an extravagant jurisdiction. It is not a long arm jurisdiction says Mr. Howard QC. It is a jurisdiction *in personam.* I agree entirely with Learned Queen's Counsel.

[48] Mr. Fay for Winfair aptly put this issue to rest when he quoted a notable passage from Lord Millett in The Angelic Grace. At page 96, the distinguished Lord Justice said:

> "We should, it is submitted, be careful not to usurp the function of the Italian Court except as a last resort, by which was meant, presumably, except in the event that the Italian Court mistakenly accepted jurisdiction, and possibly not even then. That submission involves the proposition that the defendant should be allowed, not only to break its contract by bringing proceedings in Italy, but to break it still further by opposing the plaintiff's application to the Italian Court to stay those proceedings, and all on the ground that it can safely to left to the Italian Court to grant the plaintiff's application. I find this proposition unattractive. It is also somewhat lacking

[11] [2005] 2 Lloyd's Rep. 170, 179.

> in logic, for if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all."

[49] Both Mr. Howard QC and Mr. Fay submit that the Applicants have a legal right not to be sued in respect of any disputes or differences in connection with or touching upon breach of the Trust Deed in any jurisdiction other than in the London arbitration. It is common ground that the arbitration agreement in the Trust Deed is valid. Lamane has commenced the LCIA Arbitration and Finecroft and Winfair are happy for Lamane to continue the arbitration to be determined in London arbitration, in accordance with the Trust Deed.

[50] It seems plain to me that Lamane has acted in blatant breach of the arbitration agreement by commencing proceedings in New York, Russia and Cyprus. Lamane has commenced these legal proceedings within a space of little more than 10 days; each proceeding raising the same or substantially the same issues. All of these proceedings revolved on an alleged breach of the Trust Deed by Finecroft and Winfair. All of these proceedings seek the same or substantially the same relief namely to unwind the transfer of Lamane's interest in the Trust to Finecroft and Winfair. Lamane contends that there are other defendants and Finecroft and Winfair are joined as necessary and indispensable parties to the New York proceedings. In my judgment, at the core of all these proceedings is the alleged breach of the Trust Deed by Finecroft and Winfair. The only logical conclusion that can be drawn is that parties were added simply as a ploy to disguise the true nature of these proceedings. These proceedings all duplicate the disputes between the parties arising out of the operations of clause 15 of the Trust Deed, which ought to be resolved in the LCIA Arbitration.

[51] In passing, it is to be observed that both Finecroft and Winfair have not submitted to the jurisdiction of any of the New York, Swerdlovsk[12] and Cypriot courts. On the other hand,

[12] See, as far as the Sverdlovsk proceedings are concerned, Finecrofts letter to Lamane of 19 October 2005 at TB2/F/9 pages 168A and 168B which clearly states that Finecroft intends to challenge jurisdiction in the Russian courts on the basis, among other things, of the arbitration agreement.

both Finecroft and Winfair have served their response in the London arbitration pursuant to Article 2.1 of the LCIA Rules.

[52] In addition, Finecroft and Winfair contend that the bringing of the same claim simultaneously in different jurisdictions is oppressive and vexatious and as such, Lamane should be restrained on this further, discrete point. The main points to be considered in this respect are:

1. The risk of inconsistent judgments and awards.

2. Each party is domiciled in a State that has ratified the New York Convention and therefore any award obtained in the arbitration will be enforceable.

3. The risk of exposure to the costs of proceedings in multiple fora at the same time after it has deliberately entered into the agreement containing an arbitration clause.

4. In each of the New York, Sverdlovsk and Cypriot Proceedings, legal costs would in very large part be irrecoverable in the event that Finecroft and Winfair succeed in those proceedings. This would not be so in the London Arbitration. Under Article 28.3 of the LCIA Rules, an arbitral tribunal can award all or part of the legal or other costs incurred by a party to be paid by the other party and so Finecroft and Winfair, if they succeed in the arbitration in London, can be confident of recovering all, or substantially all, of its costs.

5. The language of the arbitration will be English as provided for in clause 35.2 of the Trust Deed. The Cypriot proceedings will be conducted in Greek and the Sverdlovsk Proceedings in Russian. This additional language barrier in two out of the three proceedings commenced in breach of the Trust Deed adds a significant inconvenience and cost to the dispute resolution process, as there will be the necessity for multiple teams of lawyers and translators; all of which would be

avoided by the parties simply adhering to their contractual bargain of having their disputes resolved in London arbitration.

6. The arbitration proceedings will be confidential. By proceeding in New York, Cyprus and Russia, Lamane has deprived Finecroft and Winfair a key benefit in the confidential dispute resolution mechanism provided in the arbitration clause. The publicity given to the proceedings has already impacted on the value of Finecroft and Winfair's interest in VSMPO-Avisma evidenced by the significant drop in the value of the shares in VSMPO-Avisma and the suspension of the trading of shares in VSMPO-Avisma on the RTS and MICEX stock exchanges by the Russian Federal Service for Financial Markets.

Other issues

[53] Mr. Husbands placed substantial emphasis on the affidavit evidence of Mr. Papatheodorou. In so far as his evidence is relevant to the issue before the Court, it is contained in paragraph 14 et seq. He deals with what he described as "Risk of Alienation." He attempts to justify the commencement of proceedings by reason of his apprehension that Finecroft and Winfair would alienate the shares they have acquired and therefore eliminate any possibility of restitution.

[54] I agree with Mr. Howard QC that the point is completely misconceived. First, the LCIA rules empower the arbitrators to issue interlocutory relief. Second, the Applicants are not contending that Lamane is not entitled to seek ancillary relief in an appropriate court. Indeed, there are ancillary proceedings in Cyprus which are intended to be ancillary to the London arbitration. The complaint before the Court is the initiating of substantive claims before a foreign court.

[55] Mr. Papatheodorou next alleges that the claims refer to other defendants as well. Mr. Howard QC submits that if Lamane wishes to join other parties as defendants, it would be

a matter in New York for the New York Court to determine whether those proceedings should continue or be stayed pending the outcome of the arbitration.[13]

[56] Mr. Alexander Shaknes, a New York lawyer and Partner in the office of the law firm DLA Piper Rudnick Gray Cary for Lamane says at paragraph 7:

> "Therefore, Lamane may not be able to bring the claims asserted in the New York proceedings in the arbitration in London. Lamane believes that the only forum that may have jurisdiction over these individuals and other parties and these claims is the New York Court. If this anti-suit injunction is nor lifted and dismissed, Lamane will be denied the opportunity to pursue these claims and thereby will be denied the opportunity to obtain the relief to which it is entitled and which justice mandates."

[57] With respect, this point is wholly misconceived. Lamane is not being denied the opportunity to pursue the claims against Finecroft and Winfair in the London arbitration and against any other parties it may choose outside of the arbitration. Mr. Shaknes next alleges that the New York proceedings are incapable of being constituted without Finecroft and Winfair because, as he says, they are necessary and indispensable parties to the New York proceedings. This is a rather surprising point as he does not refer to any jurisprudence on arbitration and the approach of the New York Court where there is an arbitration clause. [14] Indeed, Mr. Shaknes has missed the essence of an arbitration clause and he has misconstrued the meaning of an anti-suit injunction. In similar fashion, the affidavit of Mr. Papatheodorou is also misconceived on most issues.

[58] Suffice it to say, Finecroft and Winfair deny that (a) the financing of the buyout of Lamane's interest under the Trust Deed was procured by creating and/or procuring to create an Encumbrance of any shares; and (b) in any event, the creation of an Encumbrance is a breach of the Trust Deed and /or would render the buyout and Transfer of Lamane's interest under the Trust Deed void or voidable.

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[13] See The Lapad (supra).

[14] See also the cases of Hirschfield and Mirvish (1995) Supreme Court, Appellate Division, First Department of New York .

[59] Be that as it may, this is not the appropriate forum in which to look at the merits. Both Finecroft and Winfair are content to have such disputes arbitrated in London.

Conclusion

[60] For all of these reasons, this is a very clear case for this Court to grant the anti-suit injunction as Lamane has not put forward any good or strong reason to persuade the Court to do otherwise.

The Order

[61] The Order of the Court will be:

1. The Respondent, Lamane Trading Corporation is, subject to paragraph 2 hereby restrained:

    a. From issuing, filing or otherwise commencing or continuing with, as against the Applicants or either of them, or taking any steps as against the Applicants or either of them in any proceedings in any court or tribunal in connection with the Trust Deed entered into by the Applicants, the Respondent and Chrysses Demetriades & Co, Law Office dated 4 March 2004 ("the Trust Deed"), or touching upon any breach of the provisions of the Trust Deed, including, without prejudice to the generality of the foregoing, the rights and remedies of the parties thereto;

    b. Without prejudice to the generality of the above, from taking any steps to prosecute and or continue as against the Applicants or either of them the proceedings commenced by the Respondents in:

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        i. the Supreme Court of the State of New York, County of New York, US, on 6 October 2005, numbered 05603581 (the "New York Proceedings");

        ii. in the Arbitrazh Court of the Sverdlovsk Region, Russia on 6 October 2005, numbered A60 – 33801/2005-S4 (the "Sverdlovsk Proceedings"); and

        iii. in the Nicosia District Court, Nicosia, Cyprus on 10 October 2005, numbered 7627/05 (the "Cyprus Proceedings").

2. The injunction set out in paragraph 1 shall not, and does not, restrain the Respondent from proceeding and/or continuing with the arbitration initiated by the Respondent pursuant to clause 35.2 of the Trust Deed against, inter alia, the Applicants in the London Court of International Arbitration ("LCIA") by a letter

dated 17 October 2005, and any ancillary proceedings to the LCIA Arbitration for interim and/or conservatory measures permitted by Article 25.3 of the LCIA Rules.

3. The Respondent shall forthwith take such steps as are necessary to discontinue or terminate or procure the discontinuance or termination of the proceedings set out in paragraph 1 above, and all of them, insofar as they are brought against the Applicants or either of them, and to set aside any interim relief granted in any of the proceedings at paragraph 1(b)(i) to (iii) above against the Applicants or either of them.

4. The Respondent shall pay Costs to Winfair in the sum of $95,337.07. The Respondent shall also pay to Finecroft, the sum of $125,000.00 representing an interim payment until the issue of costs is fully litigated on Thursday, 26 January 2006.

Indra Hariprashad-Charles

High Court Judge