Neutral Citation Number: [2019] EWCA Civ 2222

Case No: A2/2019/2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT QUEEN'S BENCH DIVISION
Mr Justice Lavender
[2019] EWHC 1972 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 December 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE PETER JACKSON

- -

MANDY GRAY	**Appellant**
v	
HAMISH HURLEY	**Respondent**

- -

Jonathan Cohen QC & Marc Delehanty (instructed by **Grosvenor Law**) for the **Appellant**
The Respondent did not attend and was not represented

Hearing date: 3 December 2019

- -

Approved Judgment

Lord Justice Peter Jackson (giving the judgment of the Court):

Summary

1. This is an appeal from the refusal of an anti-suit injunction.

2. Article 4(1) of Regulation (EU) No 1215/2012 of the European Parliament and Council of 12 December 2012 ("the Judgments Regulation") provides that:

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

3. In this case, two issues arise about the interpretation of this provision:

   (1) As a matter of law, does Article 4(1) oblige the court to grant an anti-suit injunction to prevent the respondent from litigating against the appellant in a third (non-EU) State?

   (2) If not, was the Judge wrong to treat Article 4(1) as irrelevant when deciding whether or not to grant the injunction?

4. Following a hearing on 3 December 2019, we have concluded that the meaning of Article 4(1) and its applicability in this case is not *acte clair* and we shall therefore stay the appeal proceedings and request the Court of Justice to give a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union. The questions to be referred are:

   (1) Does Article 4(1) confer a directly enforceable right upon a person domiciled in a Member State?

   (2) If it does,

      (a) Where such a right is breached by the bringing of proceedings against that person in a third State, is there an obligation upon the Member State to provide a remedy, including by the grant of an anti-suit injunction?

      (b) Does any such obligation extend to a case where a cause of action available in the courts of a third State is not available under the law applicable in the courts of the Member State?

5. In this judgment, we explain our reasons for seeking the preliminary ruling. It is also necessary for us to decide a prior question raised by the appellant, who submits that both the Judge and this court are bound by previous decisions of this court to grant the injunction. We do not accept that submission for the reasons given below.

Background

6. This is to be found in two judgments given by Lavender J in proceedings brought in the Queen's Bench Division by Ms Mandy Gray, the appellant, against Mr Hamish Hurley,

the respondent. The first judgment, given on 25 June 2019, set out the facts in detail, rejected a challenge by Mr Hurley to the court's jurisdiction, and disposed of a range of case management issues: [2019] EWHC 1636 (QB). The second, given on 23 July 2019, contains the Judge's ruling on the anti-suit injunction issue: [2019] EWHC 1972 (QB).

7. The facts can be shortly stated. Ms Gray was until 2014 a United States citizen. In 1995 she married Randy Work, a successful investment manager. After periods living in Japan and Hong Kong, they moved to London in 2008. In 2013, they separated and in 2015 they divorced. There were heavily contested financial proceedings, from which Ms Gray emerged with half of the matrimonial assets, her share amounting to some US$120 million: Gray v Work [2015] EWHC 834 (Fam), a decision upheld on appeal: Work v Gray [2017] EWCA Civ 270.

8. Mr Hurley is a New Zealand citizen who was born and educated in New Zealand. He married in 1997 and came to live and work in England in 2002 with his wife. In 2008 they separated and in 2014 they divorced.

9. In 2009, Ms Gray met Mr Hurley in London, where he worked as a physical therapist. In March 2013, they began a romantic relationship that lasted until January 2019.

10. During the relationship, the couple pursued a lavish international lifestyle funded entirely by Ms Gray. They spent more time abroad than in the UK and they each acquired Maltese citizenship in February 2017. The following assets (and others not the subject of legal proceedings) were acquired using Ms Gray's money but were held either in joint names or in Mr Hurley's sole name or in corporate names:

    (1) A property in Italy costing €9.5 million upon which a further €9 million was spent on restoration and renovation.

    (2) A farm in New Zealand costing NZ$25 million.

    (3) Four sports cars in Switzerland costing over €11million.

    (4) Deposits on two further cars at between €0.5 million and €1 million for the first and CHF 30,000 for the second.

    (5) Business investments totalling US$9.1 million.

11. In January 2019, Ms Gray ended the relationship. She changed her will, cancelled Mr Hurley's credit cards, and closed their joint accounts.

The litigation

12. In February 2019, Ms Gray's solicitors began to assert her rights to the assets listed above in correspondence to Mr Hurley and his solicitors.

13. On 25 March, Mr Hurley began proceedings in New Zealand seeking an order under the Property (Relationships) Act 1976 which applies to qualifying co-habiting couples following the end of a relationship. It distinguishes between 'relationship property' and 'separate property'. It provides for the division of 'relationship property', with a

presumption of a half share. Mr Hurley's claim as pleaded covers the listed assets and other assets purchased during the relationship, such as a yacht and artwork.

14. On 26 March, Ms Gray issued proceedings in the High Court in England seeking a declaration that she was entitled absolutely to the listed assets, or that they were held on resulting trust, or for restitution by reason of undue influence.

15. At the same time Ms Gray obtained an order for alternative service from Master Cook pursuant to which she served the High Court Claim on Mr Hurley via WhatsApp message and by other means. Service was deemed to have taken place on 28 March.

16. There followed a welter of applications by both parties:

    (1) On 9 April, Ms Gray issued an application for a proprietary injunction restraining Mr Hurley from dealing with the listed assets, and

    (2) for an anti-suit injunction restraining Mr Hurley from pursuing the New Zealand Proceedings.

    (3) On 24 April, Mr Hurley issued an application challenging the jurisdiction of the High Court to determine the dispute, and

    (4) seeking to set aside the order for alternative service.

    (5) On 30 April, Ms Gray issued a cross-application seeking leave to serve the High Court Claim out of the jurisdiction.

    (6) On 3 May, Mr Hurley issued an application seeking to adjourn the various applications and for various case management directions to be given.

17. On 8 May, the various matters came before the court, when they were adjourned for a short time.

18. On 11 June, the matter came before Lavender J. He heard Mr Hurley's jurisdiction challenge together with Ms Gray's cross-application, and adjourned the other matters until a 'consequentials hearing' at which he would hand down judgment on the jurisdiction challenge.

19. On 17 June, Mr Hurley issued an application seeking to stay the English proceedings pursuant to the *lis pendens* provisions in Article 34 of the Judgments Regulation. He subsequently abandoned this application and it was dismissed.

20. On 25 June, the consequentials hearing took place. The Judge handed down his first judgment dismissing Mr Hurley's jurisdiction challenge and made orders reflecting that decision. He then heard Ms Gray's anti-suit application, and ordered that a further consequentials hearing would take place at which he would hand down judgment on that issue. He accepted undertakings from Mr Hurley that he would not pursue the New Zealand Proceedings until the further consequentials hearing. He made no order on Ms Gray's proprietary injunction application, accepting Mr Hurley's undertakings that he would not deal with the listed assets in any way until judgment in the action or further order of the court.

21. By way of digression, we note that one of Mr Hurley's arguments was that the Judgments Regulation does not apply in this case because Article 1(2)(a) excepts:

> "… rights in property arising out of matrimonial relationship or out of a relationship deemed by the law applicable to such a relationship to have comparable effects to marriage."

The Judge did not agree. He referred to the Rome II Regulation (Regulation (EC) No 864/2007), which contains an equivalent provision to Article 1(2) and which, by Recital 10, states that the exception:

> "should be interpreted in accordance with the law of the Member State in which the court is seised."

The Judge accepted the argument of Ms Gray that the applicable law is English law and that as English law does not deem a relationship of this kind to have comparable effects to marriage, the exception did not apply. The alternative approach would have been for English law to treat New Zealand law as "the law applicable to such a relationship". There has been no appeal from the Judge's ruling on this issue, or indeed from any other aspect of the first judgment, and we express no view about the correctness of the conclusion on this issue.

22. What is of relevance is that in the first judgment the Judge determined the issue of the parties' domicile for the purposes of Article 4. He found that Ms Gray was domiciled in England. Mr Hurley's case was that he was, and always had been, domiciled in New Zealand. The Judge however found that there was a good arguable case for Mr Hurley being domiciled in England up to January 2019 but that by 26 March 2019 he was no longer resident or domiciled here. It was however his last known domicile, as he had not been domiciled in New Zealand for many years and he had not acquired domicile in Malta. Finally, as part of Ms Gray's cross-application, the Judge concluded that England was clearly the appropriate forum for her claims.

The anti-suit judgment

23. On 23 July, the Judge handed down his second judgment, dealing with the anti-suit application. He began by addressing domestic law on anti-suit injunctions. In particular, he directed himself in accordance with the principles set out by Toulson LJ in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2010] 1 WLR 1023 at [50]. He then surveyed the provisions of the Judgments Regulation and referred to the decision of the Court of Justice in *Owusu v Jackson* (Case C-281/02) [2005] QB 801, [2005] 2 All ER (Comm) 577 at [37], where Article 2 of the Brussels Convention 1968 (the predecessor to Article 4(1)) was held to be mandatory so as to prevent the court of a Member State from declining jurisdiction in favour of the court of a third State on *forum conveniens* grounds. He did not accept that he was bound by precedent as Ms Gray contended. He then rejected her submission that a 'breach' of Article 4(1) was at least a significant factor in the exercise of his discretion. Instead he exercised his discretion with reference to the *Deutsche Bank* factors. In doing so, he reiterated that England was the appropriate forum for the trial of Ms Gray's claims, but recognised that Mr Hurley's claim in New Zealand could not be determined in England. He rejected a submission that there was no material connection between the parties and New Zealand. He did not accept that pursuing the New Zealand claims would be

unconscionable or illegitimate. He recognised the role of comity and the fact that it was still open to a New Zealand court to decline to entertain Mr Hurley's application, either on the basis that he was not domiciled in New Zealand or for some other reason. He bore in mind that an anti-suit injunction would not require Mr Hurley to bring his claim elsewhere, but rather to prevent him from bringing it at all.

24. Accordingly, in an order of 29 July the Judge dismissed Ms Gray's anti-suit application. He granted permission to appeal on two grounds:

    (1) Whether he was wrong that Article 4(1) of the Judgments Regulation did not require the grant of an anti-suit injunction.

    (2) Whether he was wrong that Article 4(1) of the Judgments Regulation was not a significant factor in the exercise of discretion as to whether to grant an anti-suit injunction.

    By the same order, he prohibited Mr Hurley from pursuing the New Zealand proceedings without advance notice until at least 14 September.

25. On 19 August, Ms Gray filed an Appellant's Notice applying for an expedited hearing. On 28 August, Coulson LJ granted an expedited hearing. He extended the prohibition upon Mr Hurley pursuing the New Zealand proceedings without notice until the appeal is heard.

26. Throughout the proceedings before the Judge, both parties were represented by solicitors and by leading and junior counsel. In this court, that remains so in the case of Ms Gray, but Mr Hurley, who is in New Zealand, has not attended or been represented, citing financial inability. However, he has communicated with the court and we have the benefit of the written submissions previously made by his legal team.

Relevant provisions of the Judgments Regulation

27. The Judgments Regulation, also known as 'Brussels Recast', is the latest step in a process of procedural harmonisation dating back to 1968. It covers a number of matters, including jurisdiction and the recognition and enforcement of judgments. In relation to jurisdiction, the central objective of the Regulation is captured in Recital 15:

> "The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction."

28. Chapter II of the Regulation, concerning jurisdiction, is divided into ten sections. Article 4 appears in Section 1, entitled 'General provisions'. As noted above, Article 4(1) provides that:

> "1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."

29. Sections 3, 4 and 5 of the Regulation respectively concern insurance, consumer contracts and employment contracts. Recital 18 provides that;

> "In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules."

Article 22(1), which appears in Section 5, provides that:

> "1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled."

30. Section 9 contains the *Lis pendens* provisions. Articles 33 and 34, introduced by the recast Regulation, provide limited exceptions to the general jurisdictional rules in cases where proceedings relating to the same cause of action (Article 33) or a related action (Article 34) are pending in the courts of a third (ie non-EU) State. The thinking behind their introduction is contained in Recital 23:

> "23. This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice."

The definition of related actions is provided by Article 30(3). It is expressed to be limited to that Article but is plainly of general application:

> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Against this background, Article 34(1) provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;

> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
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> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice."

In the present case, Mr Hurley abandoned reliance on Article 34 (see para. 19 above) although he did not formally accept that it was not applicable. Ms Gray's submission had been that the Article was not engaged because the New Zealand action was not "pending" when the English claim was issued because it had not been served first, that it would not be possible to try Ms Gray's English cause of action alongside Mr Hurley's action in New Zealand and that the Judge's conclusion on the convenient forum for Ms Gray's claims spoke against staying her proceedings. It is unnecessary for this court to express any view about any of those matters.

Binding precedent?

31. On behalf of Ms Gray, Mr Cohen QC submits that Article 4(1) provides her with a right not to be sued outside England, where she is domiciled, and that the court is obliged to give effect to this right by the grant of an anti-suit injunction to restrain proceedings in a third State. He further contends that it is impermissible for the Judge or this court to take a different view because of binding authority in the form of two decisions of this court: *Samengo-Turner v J & H Marsh McLennan (Services) Ltd* [2007] EWCA Civ 723 ("*Samengo-Turner*") and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828 ("*Petter*").

32. In both *Samengo-Turner* and *Petter*, the Court of Appeal considered what is now Article 22(1). In each case the court held that this provided a mandatory exclusive jurisdiction of the English courts which was to be protected by injunction. The question is whether that reasoning extends beyond the context of the decisions, namely employment contracts, so that it is generally applicable, including to cases falling under Article 4(1).

33. The facts of *Samengo-Tuner* and *Petter* were similar. In both cases the claimants were employees domiciled in England who worked for employers whose parents companies were based in the United States. The claimants were entitled to benefits in the form of bonuses or stock options. The contracts governing these benefits contained exclusive jurisdiction clauses in favour of the relevant American courts. In both cases, it was held that those contracts were part of the claimants' employment contracts so that Section 5 of the Judgments Regulation was engaged. In both cases, anti-suit injunctions were granted. In *Petter* the court considered itself bound by the decision on indistinguishable facts in *Samengo-Turner*.

34. In *Samengo-Turner*, the only substantive judgment was given by Tuckey LJ, with whom Longmore and Lloyd LJJ agreed. At [22] he set out what he described as "the relevant provisions of Section 5", with particular focus on Article 20(1). He concluded

at [37] that the provisions of Section 5 were engaged and then approached the issue of remedy in this way:

> "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.
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> 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.
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> 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.
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> 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."

Accordingly, an anti-suit injunction was granted to restrain the defendants from proceeding in New York.

35. In *Petter*, judgments were given by each member of the court. Moore-Bick LJ, with whom Vos LJ and Sales LJ agreed, noted the striking factual similarity with *Samengo-Turner* and held that the judge in *Petter* had been bound by the earlier decision. Moore-Bick LJ stated:

> "29. Some commentators have suggested that the effect of Article 22(1) of the Regulation is to create rights of a public, rather than a private, nature which are not capable of being protected by injunction. However, no argument of that kind was addressed to us and it would in any event have been precluded by the decision in *Samengo-Turner*, in which the existence of a right capable of protection by injunction was the foundation of the decision.
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> …
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> 31. The judge may or may not have been right to assume that EMC would disregard any injunction granted by the English court and pursue the proceedings in its home court, leading ultimately to a stalemate, but with great respect to him, I do not think that he was entitled to depart from the approach adopted in *Samengo-Turner* on the grounds that the requirements of

> comity precluded the grant of an injunction in this case. Although the grant of an injunction is a matter of discretion, that discretion must be exercised in accordance with established principles. Whatever criticisms may have been made of the decision in *Samengo-Turner*, there can be little doubt that the court (which had the requirements of comity well in mind) did not consider that they required it to withhold relief. If it is necessary to spell out the principle which emerges from the judgment it is that in a case falling within Section 5 of the Regulation an anti-suit injunction should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee's rights.
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> 32. The fact that it is not permissible for the courts of one Member State to grant anti-suit injunctions to restrain proceedings in the courts of another Member State does not seem to me to be of any significance. The restriction on the right to grant anti-suit injunctions to restrain a party from pursuing proceedings in another Member State rests primarily on the existence of legislation regulating the exercise of jurisdiction within the Union and the need for Member States to trust each other to implement it properly: see *Turner v Grovit* (C-159/02) [2005] 1 AC 101. Not only is an anti-suit injunction unnecessary in that context, it would involve an interference with the working of the Regulation. In cases where proceedings are threatened or pending in the courts of a state outside the Union, no such inhibition exists.
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> 33. Nor can I accept Mr. Bloch's submission that the fact that courts of other Member States do not have the power to grant anti-suit injunctions (if that be the case) indicates that it is not necessary to grant an injunction to protect the employee's right. The scope of the powers available to the courts of the different Member States to protect and vindicate rights may vary and each court is entitled to resort to the powers available to it to protect a party's rights once they have been established. The fact that the right to be protected itself is derived from an EU Regulation does not seem to me to provide any reason for withholding a suitable form of relief if the court has power to grant it. What is necessary in the interests of justice will depend on the particular facts of the case. If doing nothing was thought not to be an option in *Samengo-Turner*, it is difficult to see how it can be an option in this case."

36. Vos LJ agreed. At [39] he summarised what *Samengo-Turner* had decided, including:

> "(ii) The correct legal analysis is that the premise for an anti-suit injunction is that the injuncted party should not be litigating in the overseas court, which is why 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 at [40] he stated:

> "40. … That *ratio* is, I think, that it is not open to the court to refuse an injunction where the overseas court cannot give and has not given effect to the Regulation, so that the only way to give effect to the English employee's statutory rights is to restrain the overseas proceedings. Moore-Bick LJ described the *ratio* as being that in a case falling within section 5 of the Regulation an anti-suit injunction should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee's rights. The difference between the formulations is probably not material and, whichever formulation is adopted, the judge was bound to follow the decision in *Samengo-Turner* and to grant the anti-suit injunction sought.
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> 41. In these circumstances, it may not be appropriate to say much more about the problem that this case and *Samengo-Turner* raised, since to do so will undoubtedly fuel the academic debate that has followed the Court of Appeal's previous decision. I should, however, like to say a few words on the legal principles that might be thought to be applicable. First, it is axiomatic that every grant of an injunction is a discretionary matter, so that it is potentially problematic to lay down principles that put the court in a position in which precedent demands that the grant of an injunction is in any sense automatic. Such a situation does not give full weight to the authorities that make clear the caution that a court should exercise in considering the grant of an anti-suit injunction.
>
> 42. Moreover, I am not sure that the *ratio* of *Samengo-Turner* takes full account of Tuckey LJ's own justifiable instinct that the case for an injunction based on a statutory right is not as strong as the case for an injunction based on an exclusive jurisdiction clause to which the parties have agreed. There was, as it seems to me, something of a disconnect between the reasoning in paragraph 41 of *Samengo-Turner* and the conclusion in paragraph 43. It is normal, but not automatic, for an anti-suit injunction to be granted on the basis of an exclusive jurisdiction clause (see the citation from Lord Bingham's speech in *Donohue v. Armco Inc*. supra at paragraph 25). Why, one might wonder, should it be automatic in the case of a statutory European or English law right? Moreover, I question whether it is right to say that 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, when the opposing party has agreed an exclusive jurisdiction clause that is in clear conflict with those obligations and his own statutory employment rights."

Vos LJ ended at [44-45] by expressing his view that the decision as to whether an anti-suit injunction had to be granted was rather more nuanced and fact dependent than *Samengo-Turner* allows. However, he accepted that the court was bound by that decision.

37. Sales LJ also agreed with Moore-Bick LJ, but he did not share Vos LJ's concerns about the decision in *Samengo-Turner*. He considered that there are good arguments of principle to support the conclusions reached in that case:

> "55. In my view, section 5 of the Regulation reflects and seeks to give expression to a clear public policy to protect employees in relation to litigation relating to their employment, because they are taken to be in a weaker negotiating position by reason of their economic and social status as against employers. The decision in *Samengo-Turner* gives effect to this public policy, as reflected in the Regulation. In my opinion, it was legitimate for the court in *Samengo-Turner* to do this."

38. The decision in *Samengo-Turner* was binding on the Judge and is binding on this court. What, then, did it decide? What was its *ratio decidendi*? The formulation of that concept as endorsed in *R (Youngsam) v Parole Board* [2019] 3 WLR 33 at [21] is sufficient for present purposes:

> "The *ratio decidendi* of a case is any point of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him."

39. As has been seen, the court in *Petter* itself sought to identify the *ratio* of *Samengo-Turner* in regard to rights and remedies. As to rights, Moore-Bick LJ stated at [29] (above) that:

> "… the existence of a right capable of protection by injunction was the foundation of the decision."

As to remedy, at [31] he held that *Samengo-Turner* had decided:

> "… that in a case falling within Section 5 of the Regulation an anti-suit injunction should ordinarily be granted to restrain an employer from bringing proceedings outside the Member States in order to protect the employee's rights."

While Vos LJ at [40] said

> "… that it is not open to the court to refuse an injunction where the overseas court cannot give and has not given effect to the Regulation, so that the only way to give effect to the English employee's statutory rights is to restrain the overseas proceedings."

But in the same paragraph he described the difference between the two formulations as "probably not material".

40. Permission to appeal from the decision in *Petter* was granted by the Supreme Court, but the case settled before the appeal was heard.

41. In this case, Mr Cohen argues that the *ratio* of *Samengo-Turner* includes, but is not limited to, the proposition that English-domiciled employees should have their right to be sued by their employer in England protected by an anti-suit injunction. He submits that the case also establishes the much wider proposition that a person with a right to be sued in England should almost invariably have that right protected by an anti-suit injunction. That, as the Judge observed, is a strong thing to say. It is all the stronger where it is said that the proposition holds good even if the cause of action in the third State jurisdiction is a completely different one and even if it is a cause of action that could not be brought in this jurisdiction.

42. The Judge considered the authorities in some detail between [20] and [30]. As to *Samengo-Turner*, he concluded:

> "25. The simple fact is that the court in *Samengo-Turner* did not have to address the question whether, as Mr Cohen contends, a "breach" of what is now Article 4(1) ought ordinarily to lead to an anti-suit injunction. I recognise the argument that the reasoning in *Samengo-Turner* extends beyond Article 22(1) to Article 4(1), but I am not persuaded that I am obliged to conclude that a "breach" of what is now Article 4(1) ought ordinarily to lead to an anti-suit injunction."

He then considered *Petter* and concluded that:

> "26. … What I need to focus on is whether the judgments in *Petter* shed any more light on the question whether the approach which the Court of Appeal in *Samengo-Turner* held should apply to an Article 22(1) case should also apply to an Article 4(1) case. I am not persuaded that they do."

43. We are not concerned at this point with whether *Samengo-Turner* was rightly decided, but rather with what it decided. In our judgement, the *ratio* of *Samengo-Turner*, as followed in *Petter*, is that Article 22(1) provides an employee domiciled in a Member State with a right to be sued by his or her employer only in the courts of his or her domicile, and that where the employer seeks to litigate in a third State the employee's right should ordinarily be protected by means of an anti-suit injunction. These were the only two points of law that were treated by the court as necessary for its decision.

44. We do not accept Mr Cohen's broader interpretation of *Samengo-Turner* and *Petter* for these reasons:

    (1) The courts in those cases were considering an entirely different question to that arising in the present case. They were not concerned with the general jurisdictional regime of Article 4 and it is not enough to say that their reasoning might as a matter of logic be transferred from Article 22 to Article 4 when the point now contended for was never argued. For example, no consideration was given to the question of why the protection given by Article 4 should be considered to be the same as that

provided by Article 22 when Recital 18 specifies that for an employee there should be "rules of jurisdiction more favourable to his interests than the general rules" and where Article 22(1) contains the word "only" while Article 4 does not.

(2) The decisions in *Samengo-Turner* and *Petter* are firmly situated in the law relating to employment contracts, as is plain from their consistent use of employer/employee terminology. Employment contracts have specific characteristics that justify their specific treatment in Section 5. The general jurisdictional provisions in Section 1 cover a much wider range of civil and commercial matters and will give rise to a different range of considerations.

(3) In *Samengo-Turner* and *Petter* there was a choice of jurisdictions in which the parties could litigate about the same cause of action. They did not address a situation where the cause of action raised in the third State litigation could not be pursued in the country of the defendant's domicile. It is unclear whether the Judgments Regulation as a whole contemplates this situation. It is not addressed in the Regulation itself, which seems to proceed throughout on the assumption that there will be a choice of forum: and see Recital 15, which assumes that jurisdiction based on the defendant's domicile will always be available.

(4) The wording of Article 22 makes clear that jurisdiction in employment situations is exclusive. The decisions in *Samengo-Turner* (at [40]) and *Petter* [at [39]) are founded on the premise that the injuncted party should not be litigating in the overseas court. The wording of Article 4 does not make this similarly clear.

(5) The editors of Dicey, Morris and Collins *Conflict of Laws* 15th Ed. ("Dicey") treat the decision in *Samengo-Turner* as being restricted to employment cases (12-022).

(6) In summary, the courts in *Samengo-Turner* and *Petter* were never required to turn their minds to the question of whether or not Article 4(1) imposes an exclusive jurisdiction, or whether the finding that Article 22(1) imposes an exclusive jurisdiction extends beyond employment cases.

45. For these reasons, we hold that the Judge was correct to hold that the decisions in *Samengo-Turner* and *Petter* were not binding upon him, nor are they binding upon us.

The scope and effect of Article 4(1)

46. We now turn more briefly to the substantive issues raised by the appeal, which concern the scope of Article 4(1) and the remedy for a 'breach'. As foreshadowed in the discussion above, the question is whether the true effect of the Article is to give a right to every defendant who is domiciled in a Member State to be sued exclusively in the State of their domicile in all but the slender circumstances where that outcome is specifically excluded or some other outcome is permitted by the Judgments Regulation itself.

47. Mr Cohen puts his argument in this way:

> "… Article 4(1) affords rights to both Gray and Hurley. Gray has a right to be sued in and only in England. Hurley has a right to sue Gray in and only in England."

In support of this proposition, he relies upon these matters:

(1) The emphasis on jurisdictional certainty underpinning the Judgments Regulation.

(2) The mandatory language of Article 4 ("shall").

(3) Decisions of the Court of Justice and the Supreme Court which, he says, show that the Regulation and its predecessors do not merely lay down procedural rules but confer rights on individuals which are enforceable ('horizontally') against others. See, for example, the decisions in *Group Josi Reinsurance Company SA v Universal General Insurance Company* (Case C-412/98); *Owusu* (above); *Hypotecni Bank v Lindner* (Case C – 327/10); and *Vedanta Resources PLC v Lungowe* [2019] UKSC 20.

(4) In support of the entitlement to an effective remedy, he relies on Article 19(1) of Treaty on the European Union and cases such as *Egenberger* (Case C-414/16), *Agria Polska v EU Commission* (Case C-373/17) and *Craeynest v Gewest* (Case C-723/17). Further, the general principles of equivalence and effectiveness require that national laws to safeguard rights under Community law must be no less favourable and effective than those to safeguard domestic rights: see, for example *Unibet v Justitiekanslern* (Case C-432/05).

48. Mr Cohen did not shrink from the wide consequences of his argument. It would lead to the apparent conclusion that an EU-domiciled tortfeasor who was being sued only in a third State could require the court of his domicile to grant an anti-suit injunction – in contrast to the 'flexible mechanism' under Articles 33 and 34 in cases where the same or related proceedings exist in both jurisdictions. By the same token, if there are proceedings in a Member State, the defendant could seek an anti-suit injunction to prevent the claimant from taking or continuing *unrelated* proceedings in a third State. And, as appears from the present case, it is said that it makes no difference that the claimant's case is not one that the courts of the Member State could themselves entertain, meaning that the 'right' said to be conferred on the claimant by Article 4(1) would have no content. In all of these cases, it is nevertheless claimed that the grant of an anti-suit injunction is mandatory.

49. Against this stand the contrary arguments, some of which were previously presented by Mr Hurley's lawyers:

(1) The propositions for which Ms Gray contends depend upon a particular interpretation of the Judgments Regulation that does not appear in the instrument itself.

(2) As to the nature and enforceability of the rights arising under the Regulation, the Judge agreed with the observation of Potter J in *Eras Eil* [1995] 1 Lloyd's Rep 64 at [76] that it was not helpful to characterise commencement of a suit elsewhere as the invasion of a right, and that of Andrew Smith J in *Evialis S.A. v S.I.A.T.* [2003] 2 Lloyd's Rep 377 at [139] that injunctive relief cannot be ordered to enforce rights conferred by a Regulation when that relief is "outwith the machinery of the Regulation".

(3) The decision in *Owusu* establishes that the court of a Member State may not itself decline jurisdiction; it does not establish a further requirement to prevent proceedings in another jurisdiction.

(4) The anti-suit injunction is not a characteristic of civil law systems, and is therefore not available in most Member States. Moreover, in *Turner v Grovit* (Case C-159/02) the Court of Justice held that the anti-suit injunction is not available as between Member States. In so holding, it observed that such an order is tantamount to interference with the jurisdiction of a foreign court and is incompatible with the principle of mutual trust that underpinned the predecessor to the Judgments Regulation.

(5) Our attention was also drawn to a number of academic criticisms of the decisions in *Samengo-Turner* and *Petter*, drawn together by Thomas Raphael QC in "Do As You Would Be Done By: System-transcendent Justification and Anti-suit Injunctions" [2016] Lloyd's Maritime and Commercial Law Quarterly 256.

50. Having considered the competing arguments, we acknowledge that Ms Gray's interpretation of the meaning and effect of Article 4(1) is a possible interpretation, but it is not one that we would wish to adopt in the present case unless required to do so. We say this because, even from the perspective of a jurisdiction that is willing to enforce rights by means of anti-suit injunction, the interpretation would lead to extreme results that would not be contemplated by an application of domestic law. This provides that the anti-suit jurisdiction is exercised where it is appropriate to avoid injustice, while recognising that is inevitably an interference with the process of the foreign court and the jurisdiction must be exercised with caution: *British Airways Board v Laker Airways Ltd* [1985] AC 58. Where a remedy is available in two jurisdictions, the English court will only order an anti-suit injunction where proceedings in the foreign court would be vexatious or oppressive: *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC). The House of Lords has held that the threshold is even higher in cases where the respondent to the application would not be able to bring proceedings elsewhere if the anti-suit injunction is ordered. These are termed 'single forum cases' and the present case is an example. In *British Airways v Laker,* the House of Lords held that an injunction could be granted to restrain foreign proceedings in such cases but it could only be ordered if the proceedings in the foreign jurisdiction were so unconscionable that it could be regarded as the infringement of an equitable right. Lord Scarman put it this way at p. 95:

> "I would emphasise that it states an approach and a principle which are of general application. The approach has to be

> cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court. Caution is needed even in a "forum conveniens" case, i.e. a case in which a remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognised and enforceable by the foreign court.
>
> Nevertheless, even in the latter case, the power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a "wide and flexible" equity it can be seen to be an infringement of an equitable right of the applicant. The right is an entitlement to be protected from a foreign suit the bringing of which by the defendant to the application is in the circumstances unconscionable and so unjust. This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained."

51. Dicey summarises the effect of this principle as follows (at 12-089):

> "The correct analysis appears to be that for a court to grant an injunction to restrain a respondent, in circumstances in which to do so will mean, in effect, that the substantive claim will not be brought to court for a hearing, is a strong thing, and that a court should require a more than usually compelling basis for finding that the making of such an order is what justice demands."

52. More generally, the object of the Judgments Regulation is to enhance access to justice and to facilitate the sound and harmonious administration of justice (see Recitals 1, 3, 16, 21, 23 and 34). One means of achieving this object is by promoting certainty in relation to choice of jurisdiction. However, in our view accessible and harmonious justice is not promoted by prioritising certainty in a case where there is in reality no choice of jurisdiction. The limited exceptions provided by Article 33 and 34 assume the existence of a genuine choice of forum. Further, it would be a severe inroad into the important principle of comity for a procedural obligation to have the effect of neutralising the statutory provisions of a foreign state. Such a profound consequence would be expected to be explicit in the Regulation and not to be arrived at *sub silentio*.

53. For all that, we cannot say that in the context of these proceedings the meaning Article 4(1) is *acte clair*. It is an important provision whose correct meaning was not obvious to the Judge (who gave permission to appeal) and cannot be regarded as obvious by this court or by other courts. We shall therefore refer the matter to the Court of Justice for a preliminary ruling before proceeding to a final determination of this appeal. In the

meantime, we shall stay the appeal proceedings and give any necessary directions in relation to interim measures.

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