PETTER v EMC CORPORATION [2015] EWCA CIV 828

The Court of Appeal has granted an anti-suit injunction to prevent an employee being sued in a foreign court by an associated company of his employer, despite the employee having agreed to that court having exclusive jurisdiction. The Court of Appeal followed its previous decision in *Samengo-Turner*.

How far will an English court go to protect an employee who has signed an agreement conferring jurisdiction on a foreign (non-EU) court?

English senior employees of multinational groups will often have a contract of employment with the UK company but also be party to a separate bonus or share option scheme containing foreign law and jurisdiction clauses. In "matters relating to individual contracts of employment", the Brussels I (Recast) Regulation allows an "employer" to be sued in the courts of the Member State where the employee habitually carries out his work (Art. 21), and an "employer" may bring proceedings only in the courts of the Member State where the employee is domiciled (Art. 22). If the employer tries to sue in the courts of a different Member State, those courts will (or ought to) decline jurisdiction.

However, the position is different when the courts of a non-Member State are involved. If the contract confers jurisdiction on an American court, for example, that court has no reason to apply the Regulation and is likely to apply the jurisdiction clause and accept jurisdiction over the English employee. It might be thought that there is not much that the employee can do about this, but in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2008] ICR 18, the English Court of Appeal granted employees an anti-suit injunction to restrain proceedings brought against them in New York under a bonus scheme containing a New York jurisdiction clause, on the basis that the US parent company was an "employer" and the employees had a right under the (old) Brussels I Regulation to be sued only in England.

The facts

Mr James Petter was a senior employee of the European subsidiary of EMC, a Massachusetts corporation providing information storage services. He was a member of EMC's stock option plan containing a Massachusetts exclusive jurisdiction clause. He left to join a competitor and a dispute arose over whether EMC was entitled to cancel his stock options. EMC sued Mr Petter in Massachusetts, and he responded by suing EMC in England. EMC brought an application in England challenging the English court's jurisdiction, and Mr Petter applied to the English court for an anti-suit injunction to restrain EMC from continuing the proceedings in Massachusetts.

The decision of Cooke J

At first instance, Cooke J followed *Samengo-Turner* in holding that both claims were "matters relating to individual contracts of employment" for the purposes of the Regulation and dismissed EMC's jurisdiction challenge. However, he refused to grant an anti-suit injunction on the basis of the balance of convenience and in the interests of international comity. He granted both parties permission to appeal.

The decision of the Court of Appeal

In its judgment on 27 July 2015, the Court of Appeal (Moore-Bick, Vos and Sales LJJ) dismissed EMC's jurisdiction appeal, allowed Mr Petter's appeal and granted an anti-suit injunction.

The Court upheld the decision of Cooke J that, while EMC was not Mr Petter's "employer" in a domestic law sense, the claims were nevertheless "matters relating to individual contracts of employment" for the purposes of the Regulation. In "reality and substance" the dispute about the stock plan was "intrinsically bound up with his contract of employment", because the stock units "were made available to him as an important employee and were intended to act as a reward for past efforts and an incentive to make efforts in the future", and the dispute was "a dispute of a kind in which he is properly to be described as the weaker party" and therefore entitled to the protection of the Regulation.

The Court went on to hold that Cooke J was wrong to refuse to grant an anti-suit injunction, and that his reliance on considerations of comity provided no basis for distinguishing *Samengo-Turner*. All three members of the Court agreed that Cooke J was effectively bound by *Samengo-Turner* to grant an injunction. As Moore-Bick LJ put it, "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." This was not affected by the fact that anti-suit injunctions cannot be granted to restrain proceedings in a Member State court, or by the fact that anti-suit injunctions are unknown in most Member States.

Although all three judges regarded themselves as bound by *Samengo-Turner*, Vos LJ added his voice to the criticisms of it: "The decision is… rather more nuanced and fact dependent than *Samengo-Turner* allows". Sales LJ responded with a vigorous defence of *Samengo-Turner:* "section 5 of the Regulation reflects and seeks to give expression to a clear public policy to protect employees … If the public policy and the rules are to be taken seriously, as presumably they are, and the means to do that are available, then there is strong reason to employ those means."

Petter thus makes clear that *Samengo-Turner* cannot be dismissed as an aberration. English courts have little choice but to follow it and grant an anti-suit injunction if presented with similar facts, even if that involves disregarding an exclusive jurisdiction agreement.

As Tuckey LJ said in *Samengo-Turner*, the court in cases of this kind faces a choice "between an anti-suit injunction or nothing". The Court of Appeal has clearly chosen the former over the latter. The Court of Appeal refused EMC's application for permission to appeal to the Supreme Court.

The full judgment can be read here:
http://www.bailii.org/ew/cases/EWCA/Civ/2015/828.html

Paul Goulding QC and Andrew Scott, instructed by Allen & Overy, acted for Mr Petter.

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