

inBrief



Application for an Anti-Suit Injunction: Dismissed

By Chatura Randeniya, Sulakshana Senanayake and Natasha Nichols | 11 November 2018

In an order dated 31 October 2018, the DIFC Court accepted that a party seeking an anti-suit injunction against proceedings in a foreign court must show that proceeding before the foreign court is or would be “*vexatious or oppressive*” to that party. The DIFC Court further held that where the applicant has the option of obtaining a stay of proceedings in the foreign court itself, the DIFC Court would have no “*compelling reason*” to grant an anti-suit injunction; to do so would not be in line with the overriding objectives of the Court.

Case Background

Afridi & Angell continue to represent the Claimants in an ongoing employment dispute (case number CFI 015-2018) in the Dubai International Finance Centre’s Court of First Instance (the **DIFC Court**).

The First and Second Claimant are group companies which conduct business in international commodities and financial services. With operations in financial centres around the world, they are registered in the DIFC and the United Kingdom, respectively (together, the **Claimants**).

The First Defendant is a former employee of the First Claimant and a current employee of the Second Defendant, a company licensed in the DIFC with a similar business to that of the Claimants. The Third Defendant is the company secretary and office operations manager of the Second Defendant. The First, Second and Third Defendants are referred to collectively as the **Three Defendants**.

In March 2018, the Claimants issued proceedings in the DIFC Court seeking immediate relief against the conduct of the Three Defendants (the **DIFC Proceedings**). The basis of the DIFC Proceedings is related to the resignation of the First Defendant from the Claimants and the actions of the First Defendant in the lead up to, and after, his resignation. The Claimants allege that the First Defendant, who at the time was an employee of the First

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Claimant, conspired with and assisted the Second and Third Defendants (his new employer and its company secretary, respectively) to facilitate the taking of the Claimants' clients and employees to the business of the Second Defendant. The Claimants sought the assistance of the DIFC Court and issued proceedings to enforce the restrictive covenants contained in the First Defendant's contract of employment, and to prevent the First Defendant from using confidential information of the Claimants for the benefit of the Second Defendant in the first "springboard injunction" proceedings before the DIFC Court.

The Claimants also initiated proceedings before the United States District Court for the Northern District of Illinois (the **US Proceedings**) against: (i) the Third Defendant; (ii) the parent company of the Second Defendant (the **Parent Company**); and (iii) the Chief Operating Officer of the Parent Company. The US Proceedings were instituted to prevent the Parent Company from an international attempt to poach the Claimants' employees.

The Second and Third Defendants (the **Defendants**) consequently submitted an application to the DIFC Courts in the form of an anti-suit injunction requesting an Order for the Claimants to stay the US Proceedings.

Anti-suit Injunctions in the DIFC Courts

An anti-suit injunction is a form of relief sought against a party to prevent them from either instituting a legal action or continuing with proceedings that have already been commenced.

The power of the DIFC Court to grant anti-suit injunctions was confirmed in *Brookfield Multiplex v DIFCI LLC* [2016] DIFC CFI 020 in which the DIFC Court held that it has the power to grant anti-suit injunctions pursuant to Article 32 of DIFC Law 10 of 2004.

Justice Sir Jeremy Cooke summarised the principles applicable to the grant of an anti-suit injunction by the DIFC Court in the following terms:

"It is self-evident that this Court should not interfere with the decisions of other courts of competent jurisdiction...and should not impugn the contents of their judgments. It is only where there is an absence of jurisdiction or where proceedings are vexatious and oppressive that a court is ordinarily prepared to grant an anti-suit injunction." (emphasis added)

The position of the Defendants in CFI 015-2018

The Defendants application requesting an Order for the Claimants to stay the US Proceedings was based on the premise that the DIFC Court has the power to grant relief where the continuation of the foreign claim would be vexatious and oppressive. It was recognised that there was a heavy burden of proof on the Defendants, but it was argued that the applicable threshold had been discharged.

The Defendants made the following submissions in support of their assertion that the continuation of the US Proceedings would be vexatious and oppressive:

- (1) The similar nature of the DIFC and US Proceedings creates a risk of conflicting decisions regarding the same facts as well as extensive and duplicative costs;
- (2) One of the three defendants in the US Proceedings is resident in the UAE; another defendant in the US Proceedings is a non-trading company; and the relief of worldwide injunction the Claimant seeks in the US Proceedings is fanciful;
- (3) The events at the heart of the Claimants claim all had a connection with the DIFC and there is no evidence of any link with the USA;
- (4) The US Proceedings were brought in order to disrupt the Defendants preparation for trial of the DIFC Proceedings and as a means to harass the Defendants; and
- (5) The relief sought would not interfere with US sovereignty.

The position of the Claimants in CFI 015-2018

The Claimants agreed that for an anti-suit injunction to be granted it must be shown that the pursuit of the foreign proceedings would be vexatious or oppressive on the injunction applicant (the Defendants). It was further iterated that the high burden of proof is at all times on the applicant and not the respondent to the application (the Claimants).

For the Defendants application to succeed, the Defendants must show that:

- (1) The DIFC is the natural forum for the US Proceedings; and
- (2) The US Proceedings are either vexatious or oppressive.

The Claimants invited the Courts to dismiss the Defendants' application for an anti-suit injunction on the following grounds:

- (1) The DIFC is **not** the natural forum for the US Proceedings on the grounds that:
 - a. the US Proceedings involve different parties each of whom have accepted service of the US Proceedings;
 - b. the US Proceedings involve a different, and notably broader, factual scope;
 - c. the causes of action in the US Proceedings are either broader or different (as applicable), with some being based on both federal and Illinois state legislation;
 - d. the relief sought in the US Proceedings is different. It would be unjust to deprive the Claimants of the additional relief available, and the additional defendants upon whom any judgment can be enforced, in the foreign proceedings; and
 - e. there is a fundamental nexus between the US Proceedings and the United States, namely that the key actions with which the US Proceedings are concerned occurred in Chicago.
- (2) The US Proceedings are **not** vexatious or oppressive. As explained by Mr Justice Cooke in *Kyrgyz Mobil Tel. Ltd v Fellowes International Holdings Ltd* [2005] EWHC 1314 (Comm), the question that must be asked is "*whether or not there was a reason justifying the foreign proceedings*". For all the reasons above, this was clearly the case. Furthermore, with particular regard to the additional relief that the Claimants are entitled to seek in the US Proceedings, the Claimants again cited Mr Justice Cooke who explained that "*for that reason alone it cannot be said that there was any vexation or oppression.*"
- (3) Notwithstanding the above, whether to grant an anti-suit injunction remains a matter for the Court's discretion and it was the Claimants position that it would be inappropriate to exercise that discretion. In support of this view, the Claimants averred that:
 - a. the Defendants evidenced an intention to issue an application for a stay of the US Proceedings and as such, and having regard to the basic principles of comity, it is right that the DIFC Court does not interfere but rather allows the US Court to decide whether to entertain the application; and
 - b. the DIFC Proceedings would likely be concluded long before a final judgment is issued in the US Proceedings meaning there is no realistic prospect of conflicting judgments. As such, the injunctive relief sought would be futile.

The Order of the DIFC Court in CFI 015-2018

His Excellency Justice Omar Al Muhairi stated that he "*found the Defendants submissions to be weak*" and that there was "*no compelling reason*" for the Court to order the Claimants to stay the US Proceedings. Accordingly, the Defendants application for an anti-suit injunction was dismissed.

In summary, Justice Al Muhairi “agree[d] with the Claimants submissions” and found that:

- (1) the US Proceedings were different both in respect of the parties involved and the relief sought;
- (2) he accepted the principle set out in *Deutsche Bank AG v Highland Crusader Offshore Partners* [2010] 1 WLR 1023 that the party seeking an anti-suit injunction must show that the proceeding before the foreign court is or would be vexatious or oppressive; the Claimants claim in the US Proceedings would be neither “vexatious nor oppressive”;
- (3) “no apparent injustice” would be suffered by the Defendants should the DIFC Court refuse to order the Claimant to stay the US Proceedings as the Defendants to the US Proceedings “are perfectly capable of making a stay application in the USA proceedings themselves”; and
- (4) making an order for an anti-suit injunction in such circumstances would “put the parties on unequal footing” which would “not be in line with the overriding objectives of th[e] Court”.

Following on from the establishment of the DIFC’s power to grant anti-suit injunctions, this landmark case reiterates the applicable threshold that must be satisfied for an anti-suit injunction to be granted in the DIFC Court. The case helpfully highlights the high burden of proof on the applicant, whilst also providing examples of relevant considerations taken by the DIFC Court, namely comity, access to justice, and the overriding objectives of the Court, when considering such applications. ■

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