SOME THOUGHTS FROM THE WEST COAST OF THE NORTH ATLANTIC

ON PROFESSOR BRIGGS, Q.C PAPER

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I have had the advantage of reviewing Professor Briggs's paper, familiarity with which is assumed. I largely agree with it. Like most Americans, I find *Petter* and *Samengo-Turner* befuddling and attribute them to the persuasive advocacy of tonight's moderator.

That said, I write to address three points: one addressed in passing in the Professor's paper and two not addressed. The first is a transatlantic view of the ease and quickness with which English (inclusive of Welsh) courts issue preliminary injunctions of any form compared with the American courts (because of our Federal system, "American courts" is a blend of national and state courts). The second is the question of how English courts would react to an agreement between a parent company about potential conveyance of equity (e.g. stock or options) in it to an employee of an English subsidiary that instead of choosing an American court for exclusive dispute resolution, as in *Petter* and *Samengo-Turner,* instead chose arbitration. The third is the corporate (companies) law background of the plans in the cases, not discussed by the Court of Appeal.

A. Easier Injunctions in England

I have been intimately involved over the last decade in many matters on both sides of the North Atlantic, including in other cases with lead counsel on both sides of both *Petter* and *Samengo-Turner*. I am licensed in NY, NY and DC, but not in England, so my comments reflect experience, not legal advice.

American lawyers think that our law on the prerequisites for a preliminary injunction derives from English law. In our view any injunction requires that there is no adequate remedy at law – that money cannot make the plaintiff/complainant whole. We impose an additional four-part test for preliminary injunctions:

(1) likelihood of success by the applicant;
(2) irreparable injury during the pendency to plaintiff;
(3) lack of injury to the defendant from the issuance of an injunction;
(4) any public interest.

Originally issuance of a preliminary injunction required passing all four tests. Since the middle of the twentieth century courts have increasingly (now widely but not universally true) imposed tests that balance the four elements. The stronger the plaintiff's case on a "peek at the merits", the less serious the harm required. Contrariwise, very serious harm

(chopping down an ancient tree) can justify an injunction where plaintiff's legal position is merely arguable, not probable of success on the merits.

Even if the articulated factors are the same between our countries, that does not mean in practice their application is the same. Three examples illustrate the point. First, restrictive covenant/garden leave enforcement in at least some parts of the financial services industry, second, antisuit injunctions and third protection of intellectual properly.

1. Garden leave and covenants

Consider the judgment of Jack, J. in *Tullett Prebon v. BGC* [2010] IRLR 648, cited with approval in later decisions:

> 223 The public interest in employees being held to their contracts may be satisfied not only by means of injunctions. *** For an injunction to be granted the employer must show that damages would not be an adequate remedy. *This is usually established, perhaps without much difficulty, by showing that the assessment of the loss would be speculative and so the loss hard to prove*. *** [Emphasis added].

Compare that with the opinion (American for judgment) in *GFI Securities LLC v. Tradition Asiel Securities Inc.,* 21 Misc.3d 1111(A), 873 N.Y.S.2d 511, 2008 N.Y. Slip Op. 52041(U) (Sup. Crt. NY Co. 2008), aff'd, 61 A.D.3d 586 (1st Dept. 2009):

> "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. To prevail, the movant must establish not a mere possibility that it will be irreparably harmed, but that it is likely to suffer irreparable harm if equitable relief is denied." [Citations omitted]
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> "Preliminary injunctive relief is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and the undisputed facts found in the moving papers". [Citations omitted]
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> Tellingly, while GFI argues that it suffered irreparable harm as a result of lost employment and customer relationships, good will and damage to its reputation, GFI fails to identify any lost customers between the date of the GFI Employees' departure and the May 20th hearing on these motions, a time period of over one month. Nor has GFI responded to the Wachovia Report. And while GFI concedes that some broker positions have been filled, it studiously fails to specify how many.

> Moreover, GFI's Statement of Claim filed with FINRA seeks compensatory damages and the imposition of a constructive trust on profits and compensation paid to respondents. In addition, the employment agreements of [8 defendants] all contain liquidated damages clauses. These clauses are "addressed precisely to the damages that [GFI] might suffer as a result of a violation of the non-competition and non-solicitation provisions" of those contracts, which "indicates that such damages as [plaintiff] may suffer could be redressed by the payment of a sum of money." Prebon Fin. Prods., Inc. v GFI Group, Inc. (Sup Ct, NY County, June 7, 2007, Ramos, J., Index Nos. 603085/2000 and 115749/2000); see also Tullett Liberty Securities, Inc. v Smith and GFI Securities LLC (Sup Ct, NY County, Nov. 17, 2004, Lowe, J., Index No. 601858/04) (no irreparable harm where employment agreement provided for monetary compensation for employee's breach, thereby providing adequate remedy at law).
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> Furthermore, SEC Rule 10b-10 requires brokers to disclose the date and time of each transaction made, and the identity, price and number of shares purchased or sold. 17 CFR § 240.10b-10 (a) (1). This rule also requires disclosure of "[t]he amount of any remuneration received or to be received by the broker from such customer in connection with the transaction." Id., § 240.10b-10(a)(2)(i)(B). GFI fails to explain why any lost revenues are not calculable; if anything, the papers before the court evidence the quantifiable nature of any injury. See e.g. GFIC Form 10-K, Lawler Aff., Ex. C, at 23-24; id., Ex. G (April 18, 2008 MarketWatch article states that, according to GFI, 24 of its defecting brokers generate "about $50 million of the company's $970 million revenue"); id., Ex. AA (April 18, 2008 Wachovia report estimating GFI's lost revenue as $35 million).

So in England when a broker (in the same sub-part of the financial services industry) moves the damages are presumptively speculative and hard to prove; but calculable in the US. One is left to wonder if the FSA (as it then was) recording regulations were materially deficient compared to the SEC? (I doubt it). Or perhaps differences in expert practice on the maths of damages lead to the difference. Contrast Civil Procedures Rules Part 35 with Fed. R. Evid. 702 (although a comparison of *Allen v. Bloomsbury Publishing*, [2010] EWHC 2560 (Ch) (esp. Para. 69-78 – experts cause denial of summary judgment) with *Allen v. Scholastic,* 739 F. Supp. 2d 642 (2011) (granting summary judgment notwithstanding same experts' opinions of same alleged copyright infringement) might lead to the opposite conclusion). Or, as I submit, U.S. Courts are more rigorous in applying the inadequacy of damages test.

In my experience in the financial services industry, English arguments about preliminary relief focus on restraint of trade: is the covenant too broad, and if so may the court use its limited "blue pencil" power to make it enforceable? In the U.S. the preliminary relief argument roams through questions such as: is the person unique or at least special, the diva like Ms. Wagner or is she a mere chorister; is the

restraint reasonably narrow so as to balance the harms of granting relief or not; can the written restriction be reformed to make it enforceable; how likely is the movant to succeed?

2. Antisuit injunctions

From our old friend, *Petter* [at para. 31]:

> 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. [emphasis added]

While the US law of antisuit injunctions is moving toward liberality in their grant, our historic antipathy persists. In 3 Litigation of International Disputes in U.S. Courts, section 16:15 says in part:

> Anti-suit injunctions are disfavored. Generally, courts will prefer to permit parallel litigation to proceed simultaneously, with all of the resultant inefficiencies, than to intrude into a foreign court's jurisdiction. Therefore, the "equitable" nature of the anti-suit injunction cannot be over-emphasized.
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> * * **
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> "It is undisputed that federal courts possess the discretionary power to enjoin parties subject to their jurisdiction from pursuing parallel in personam litigation before foreign tribunals," however, plaintiffs "face a very high bar in seeking an international antisuit injunction." [footnotes omitted]

But wait a bit the oysters cried: didn't the Massachusetts federal district judge issue an antisuit injunction in the US part of *Petter.* Indeed, but that was only after the English injunction and explicable by the famous legal principle *tu quoque* (or perhaps the motto of the Order of the Knights of the Garter). A judgement in Potter not found on Bailii and not bearing a citation different from the popular one notes the Court of Appeal granted an antisuit injunction the day before the U.S. Court, and unlike the U.S. injunction it allowed no exceptions:

> 8. On 23rd July 2015 EMC filed a motion with the District Court on an emergency

basis seeking an urgent telephone hearing. In that motion EMC referred to the letter from Allen & Overy to this court of 23rd July 2015 asking for a decision on Mr. Petter's request for an anti-suit injunction before the hearing in the District Court fixed for 27th July 2015. EMC stated that it believed that a decision was imminent (as it was) and sought the court's "immediate guidance as to how to proceed."

9. As soon as Allen & Overy learnt of EMC's application for an emergency hearing they made an urgent application to this court by email (copied to counsel for EMC) for an interim injunction prohibiting EMC from pursuing the proceedings in the District Court pending the determination of the appeal or further order. After a short telephone hearing at which Mr. Goulding appeared without notice to EMC *I granted an injunction in substantially those terms at about 7.45 p.m. on 23rd July 2015* and it was communicated to EMC's counsel in Massachusetts shortly afterwards. As a result, when counsel for EMC attended the telephone hearing later that day she was obliged to explain to the judge that she could play no active part in the proceedings. She did, nonetheless, inform the judge that the injunction did not oblige her to withdraw the two motions filed on 21st July.

10. Exactly what then occurred remains unclear. The transcript of the telephone hearing, which lasted only some seven minutes, concludes with Judge Hillman confirming that the hearing fixed for 27th July was still on, but saying that he wanted to digest what had happened and would let the parties know. *However, on 24th July 2015 Judge Hillman granted an injunction restraining Mr. Petter from taking any further steps in the proceedings in this country, other than allowing this court to give its decision on the appeals and commencing or participating in any appeal from that decision*. He gave no reasons apart from those contained in the recitals to his order. [emphasis added]

3. Intellectual property

Finally, a little afield from the ELA's remit, but to illustrate the breadth of the difference, the Court of Appeal has held that intellectual property is presumptively protectable by injunction, the U.S. Supreme Court the opposite. Contrast (1) SMITHKLINE BEECHAM PLC (2) GLAXOSMITHKLINE (UK) LIMITED and APOTEX EUROPE LIMITED NEOLAB LIMITED WAYMADE HEALTHCARE PLC [2003] EWCA Civ 137 with EBAY INC. Et al. V. MERCEXCHANGE, L. L. C., 547 U.S. 338(2006).

B. Arbitration

The United Kingdom and the United States are both signatories to the most successful treaty (measured by number of signatories) in the world: The New York Convention.

The Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The ELA issued a report on Arbitration and Employment Disputes in November 2017, https://www.elaweb.org.uk/sites/default/files/docs/ELA%20Arbitration%20%20Employment%20Disputes%20report_November%202017.pdf Paragraph 51 of this report notes:

> It is not our role to provide a monograph on the precise relationship between arbitration and these EU instruments. We note that article 1(2) of Brussels I Recast provides that "This Regulation shall not apply to...(d) arbitration", which appears to be reinforced by Recital 12. Article 1(1)(e) of Rome I similarly provides that it has no application to arbitration agreements.11 There are, however, those who consider that the employee-protective provisions of Brussels I Recast and Rome I may preclude reliance on arbitration clauses in the employment context. This debate may ultimately be a matter for judicial determination.

Since the Report the CJEU has shown antipathy to arbitration in a different context. Slowakische Republik v Achmea BV (Case C-284/16) (1). http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&doclang=EN

Perhaps someday we will know the answer about arbitration, although after next March, perhaps not in a US-UK dispute.

C. Corporate (companies) Law

It is internationally recognized that every country has the ability to adjudicate title to real property in that country, even when the owner is entitled to sovereign immunity. English courts adjudicate who owns the American Embassy in London if there is a dispute; American courts who owns the UK embassy in DC. A related notion is called the internal affairs

doctrine: for all matters affecting the internal affairs of a corporation, the law of the state that chartered it governs and in many instances the courts of that state should adjudicate disputes (a doctrine that had waned but is waxing). Would a U.S. or German Court adjudicate a claim under Part 11 of the UK Companies Act 2006? Is the underlying merits claim in *Petter or Samengo-Turner* so different?

Under the corporation law of many states (Companies Act) there are prohibitions or restrictions on a subsidiary owning stock in its parent or voting it (for reasons relating to anti-takeover matters). Under federal securities law ownership of stock by a member of the group of companies associated with the issuer may adversely affect its registration under securities laws, rendering it functionally inalienable. So in the cases here, the English subsidiary may well not have been able to own stock in its parent to give to its employees. In any event, DE or MA courts may well take the view that they, and only they, to the exclusion of a sister American state or a foreign country, may adjudicate who owns the stock the employees in these cases claimed.

This has several effects. First, whatever its effects, this and chronology suggest the plans in these cases were organized that way for valid reasons, not for the purpose of evasion of Brussels (recast). Second, the seminal case of Lumley v. Wagner teaches Chancery should not enter injunctions it lacks the means of enforcing. And whilst the Court of Appeal has twice held an American company subject to English jurisdiction, what means of enforcement would it actually have against the American parent who relied on these doctrines to ignore the English court? If the US court ordered the parent to proceed there, so the parent had conflicting orders, any rational lawyer would tell it to comply with the courts of its home. And is compliance with one of two conflicting orders contemptuous of the other?

Finally, the US and UK are parties to the ICSID convention and many other treaties. If an English court ordered the American company to give the subsidiary's employee the stock, would there be a claim to be heard in ICSID or UNCITRAL arbitration against the UK?

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