THE INTERFERENCE PARADOX

In *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599, [2020] x WLR xxxx, the Court of Appeal granted an anti-suit injunction restraining a foreign judgment creditor from seeking foreign court orders requiring its judgment debtor to assign or transfer intangible property deemed to be situated in the UK. The Court's reasoning in aid of this decision calls into question the basis on which courts in England and elsewhere have granted anti-suit injunctions since the early 19th century.

The dispute between two software companies, SAS Institute Inc (SAS) and World Programming Ltd (WPL), has been fought for many years on many fronts. SAS (incorporated in North Carolina) brought claims in England against WPL (incorporated in the UK) alleging copyright infringement and breach of contract. Those claims were unsuccessful following a trial before Arnold J. and a reference to the European Court of Justice (see [2020] EWCA Civ 599, [9]-[11]). In the meantime, SAS had also brought proceedings against WPL in the United States District Court for the Eastern District of North Carolina adding a claim for fraudulent inducement to contract and a statutory claim under the North Carolina Unfair Trade and Defective Practices Act (N.C. Gen.Stat. § 5-1.1). WPL submitted to the jurisdiction of the North Carolina court, which gave judgment against it for damages of some US$79 million, a trebling under the UTDPA of the compensatory award of around US$26 million assessed by the jury. The judgment was upheld on appeal (874 F.3d. 370, 4th Cir. 2017; see [2020] EWCA Civ 599, [12]-[18]).

SAS understandably took steps in England and the US to enforce the judgment in its favour. An claim to enforce the North Carolina judgment in England was rejected by Cockerill J. on the grounds of issue estoppel, abuse of process and public policy as well as the statutory defence for multiple damages awards in s.5 of the Protection of Trading Interests Act 1980 (PTIA) (ibid. [20]). She also gave judgment in WPL's favour on its counterclaim under PTIA s.6 to claw-back any amounts paid in excess of the compensatory award (ibid. [21]).

Among the enforcement steps taken in the US, SAS applied to the District Court for the Central District of California for an Assignment Order, requiring WPL to assign to SAS its rights to payment from specified customers in the US and elsewhere, and a Turnover Order, requiring WPL to transfer to the US federal enforcement authority all monies derived from those customers (ibid. [24]-[33], [35], [37]). None of the specified customers was based in the UK, but SAS reserved its right to seek orders relating to the accounts of such customers in the future (ibid. [34], [36], [38]). The Californian court made orders on SAS' application. Although the precise effect of those orders was the subject of ongoing litigation between the parties, for present purposes both the Californian and the English court accepted that they would take effect *in personam* as directions to WPL backed by the threat of contempt proceedings (ibid. [26], [32], [81]) and not *in rem* as directly affecting WPL's proprietary entitlements to its assets.

In December 2018, shortly after Cockerill J.'s judgment on the English enforcement claim, WPL applied for an interim anti-suit injunction to restrain SAS from seeking an Assignment Order, a Turnover Order or similar relief from any court in the US. Robin Knowles J. granted

that injunction, together with an injunction (triple anti-suit) restraining SAS from seeking in the US to restrain WPL's anti-suit proceedings (ibid. [39]).

The North Carolina court, as one might expect, reacted speedily and forcefully. Of its own motion, it issued an order prohibiting clawback of monies collected in the US and, on SAS' application, restrained WPL from licensing its software to new customers in the US until it had satisfied fully the judgment against it (ibid. [40]-[41]). WPL appealed unsuccessfully against those orders. The judgment of the Fourth Circuit Court of Appeals (No. 19-1290, 4th Cir. 2020) should be required reading for all English judges asked to grant an anti-suit injunction. The US Court of Appeals reserves its strongest criticism for WPL (ibid. 11, 12):

> 'Instead of making a good-faith effort to pay up, WPL has repeatedly engaged in collateral attacks on the district court's judgment by calling upon the UK court system.'
>
> 'Rather than challenge SAS's efforts in the Ninth Circuit, WPL turned to the English courts and engaged in a two-pronged attack on the US judgment.'

The English courts, however, do not escape its ire (ibid. 14, 18):

> 'The combined impact of WPL's actions was particularly destructive. The UK injunction undermined SAS's ability to enforce the US judgment, while the UK clawback order attempted to undo SAS's limited collection success.'
>
> 'Comity is not advanced when a foreign country condones an action brought solely to interfere with a final US judgment.'

Meanwhile, in September 2019, Cockerill J. had declined to continue the anti-suit injunction ([2019] EWHC 2481 (Comm)). She accepted that the Assignment and Turnover Orders went further than an English court would have been willing to go in a mirror image case and had the capacity to operate in England. The orders were, to that extent, 'exorbitant', but not markedly so (ibid. [148]-[158]) and not 'in a different ballpark' (ibid. [159]). She encouraged the US court, no doubt familiar with this metaphor, to bear these matters in mind in exercising their own powers (ibid. [186]-[190]).

WPL's appeal against that decision was partially successful. The Court of Appeal (Males L.J. with whom Flaux and Popplewell L.JJ. agreed) discharged the order made by Robin Knowles J., which Cockerill J. had continued pending the appeal, but substituted an injunction restraining SAS from (a) seeking an Assignment Order relating to debts of WPL customers outside the US and the UK who had contracted on terms providing for the resolution of disputes by arbitration in London or the exclusive jurisdiction of the English courts, and (b) seeking a Turnover Order relating to the debts of those customers or any funds held with UK banks ([2020] EWCA Civ 599, [137]). The Court was also prepared to extend the anti-suit injunction to prohibit measures concerning the debts of all of WPL's UK customers, but accepted an undertaking by SAS to give advance notice of any future application for an Assignment Order extending to those debts.

The Court of Appeal's reasoning in support of this decision, and the orders made, proceeds in ten steps as follows. First, under English conflicts of laws principles, debts are treated as

situated in the place of the debtor's residence or domicile, unless the debt is owed under an agreement providing for the resolution of disputes by arbitration in England or the exclusive jurisdiction of an English court, in which case the debts are treated as situated in the seat of the arbitration or of the court (ibid. [59]).

Secondly, as a matter of customary international law, the jurisdiction to enforce judgments is strictly territorial. As the Court put it (ibid. [64], [71]):

> '[F]or a court in State A to seek to enforce its judgment against assets in State B would be an interference with the sovereignty of State B.'
>
> '[T]hese principles are recognised internationally.'

Thirdly, factors that legitimise a foreign court's exercise of adjudicatory jurisdiction with respect to the defendant's person and the subject matter of the dispute do not confer enforcement jurisdiction on that court (ibid. [70]).

Fourthly, the Assignment Order and the Turnover Order infringe the sovereignty of the UK insofar as they affect property (debts) situated in the UK (ibid. [72]), specifically (a) debts of WPL's UK customers and of its non-UK customers who had contracted on terms providing for dispute resolution in the UK, and (b) WPL's UK bank accounts (ibid. [61]).

Fifthly, although the Assignment Order and the Turnover Order operate *in personam*, not *in rem*, it is the substantive effect not the form of the order that must be scrutinised (ibid. [73]).

Sixthly, although English courts sometimes make orders to aid enforcement of a judgment that affect assets situated abroad, including freezing and receivership orders, they will only do so on terms that make their effectiveness (at least as regards non-parties) subject to such orders being recognised and enforced by the courts in the State in which the property is situated (ibid. [74]) and stop short of compelling action by a foreign person in a foreign country in respect of assets situated in that country (ibid. [81]).

Seventhly, as the English courts had refused to recognise and enforce the US judgment that the Assignment and Turnover Orders were intended to enforce, 'assets located here are beyond the territorial reach of the US courts' (ibid. [88]).

Eighthly, English courts have jurisdiction to grant anti-suit injunctions 'when the ends of justice require it', including when necessary to protect the jurisdiction of the English court and when the pursuit of foreign proceedings is vexatious or oppressive (ibid. [90]). Such injunctions may, if appropriate, restrain foreign measures of enforcement (so-called 'anti-enforcement injunctions') (ibid. [93]).

Ninthly, comity is an important consideration in exercising the jurisdiction to grant anti-suit injunctions, but it is of less weight when the foreign court is acting in violation of customary international law (ibid. [103]). Comity is a 'two-way street' (ibid. [111]), with the consequence that (ibid. [112]):

> 'Just as it is inconsistent with comity for the English court to purport to interfere with assets subject to the local jurisdiction of another court, so it is inconsistent with comity

for another court to purport to interfere with assets situated here which are subject to the jurisdiction of the English court.'

Tenthly, although delay in applying for an anti-suit injunction and the fact of the injunction claimant's submission to a foreign court's jurisdiction are also factors militating against the grant of an injunction, neither provided a reason to refuse an injunction in the present case (ibid. [113]-[117]).

It followed, the Court concluded, that the injunction originally granted by Robin Knowles J. was an unjustifiable interference with the enforcement jurisdiction of US courts insofar as it extended to measures taken to enforce the US judgment against the debts of WPL's US customers, none of whom had contracted on terms requiring disputes to be resolved in the UK (ibid. [120]). Moreover, although any Assignment Order issued by the US court might be exorbitant in relation to debts situated outside the US and the UK, the English court did not have a sufficient interest to restrain SAS from seeking such an order (ibid. [129], [131]). By contrast, insofar as they related to debts of WPL's customers or of its banks situated in the UK, the Assignment Order and Turnover Order constituted 'an exorbitant interference with the jurisdiction of the English court, in light of the internationally recognised principles for the territorial allocation of enforcement jurisdiction' and could also be characterised as 'vexatious' for that reason (ibid, [124], [127], [130]). An anti-suit injunction, restraining SAS from seeking those measures, was the appropriate response to that interference, save to the extent that SAS had given an undertaking not to apply for them without advance notice (ibid. [125], [128], [131]).

Males L.J.'s cautious judgment does its best to dampen the embers of transatlantic tension (ibid. [101], [106]-[107], [128]). The Court of Appeal's reasoning is, however, troubling.

The limits of a State's jurisdiction in international law fall to be settled by principles of customary international law, requiring 'a widespread, representative and consistent practice of states on the point in question, which is accepted by them on the footing that it is a legal obligation' (*Benkharbouche v Embassy of the Republic of Sudan* [2017] UKSC 62, [2019] A.C. 777, [31] (Lord Sumption)). Although international law clearly prohibits a State from sending its agents to seize tangible assets situated abroad, the outer limits of enforcement jurisdiction in international law remain unsettled: as Professor Crawford puts it 'the governing principle of enforcement jurisdiction is that a state cannot take measures on the territory of another state by way of enforcement of its laws without the consent of the latter' but 'the principle of territoriality is not infringed just because a state takes action within its own borders with respect to acts carried out in another state' (*Brownlie's Principles of Public International Law* (Oxford: OUP, 9th edn., 2019), 462).

The Court of Appeal, understandably, felt itself constrained by earlier authority (notably, *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 A.C. 26) to treat the customary rule as equally applicable to foreign situated intangible property, even though the English courts have never satisfactorily inquired as to whether that extension is supported by relevant state practice.

Nevertheless, if one takes the Court's second proposition at face value, its first four propositions taken together combine the claimed rule of public international law with a rule of the English conflict of laws that attributes an artificial location to a chose in action in order to determine which national law rules govern transactions affecting it (Lord Collins of Mapesbury and others (eds.), *Dicey, Morris & Collins, The Conflict of Laws* (London: Sweet & Maxwell, 15th edn., 2012), [22-025]). On its face, this combination of international and national rules is lacking in logic and not supported in state practice.

Moreover, the Court's third and fifth propositions stretch the customary rule further to prohibit measures requiring a defendant who has participated fully in the proceedings personally to take steps to make assets available to satisfy the judgment against him, if those assets are situated abroad (even if they remain abroad after those steps are taken). This seems, on any view, a step too far: the foreign court manifestly has a sufficient interest to act to regulate the conduct of those litigating before it in order to preserve the integrity of its orders. As Hoffmann J. put it in *Mackinnon v Donaldson Lufkin & Jenrette Securities Corp* ([1986] Ch. 482, 492) '[i]f you join the game you must play according to the local rules'.

Of wider significance for the conflict of laws in England is the Court of Appeal's evident desire to look through the *in personam* form of the order and to focus instead on its substantive effects, coupled with its insight that comity is a 'two way street' justifying the grant of an anti-suit injunction in response to the perceived interference with UK sovereignty by an instrumentality of a foreign State.

Under the customary international law principles governing State responsibility, the grant of an injunction restraining the US enforcement proceedings might be argued to constitute a legitimate countermeasure to an internationally wrongful act, assuming an excess of jurisdiction on the US Courts' part (see UN Principles on the Responsibility of States for Internationally Wrongful Acts (2001), Arts 22, 49-53). The Court's reasoning lays bare, however, the common law's traditional defence of the anti-suit injunction, that it is not an impermissible interference with the sovereignty of a foreign State because the Court acts only upon the person (or, more accurately, the conscience) of the defendant and not upon the foreign court or the suit before it (*Carron Iron Co v Maclaren* (1862) 5 H.L. Cas. 416, 436-437, 10 E.R. 961, 970 (Lord Cranworth L.C.); *Société Nationale Industrielle Aerospatiale Appellants v Jak* [1987] AC 871, 892 (Lord Goff); *Turner v Grovit* [2002] 1 W.L.R. 107, [22]-[23], [28] (Lord Hobhouse)). Once the formal '*in personam*' veil is lifted, however, an anti-suit injunction that interferes with a foreign court's internationally lawful exercise of the adjudicatory jurisdiction vested in it by its own State is (at best) no less objectionable than a court order that interferes with a foreign State's internationally lawful exercise of its enforcement jurisdiction. Indeed, insofar as the anti-suit injunction requires the injunction defendant to take positive steps in a foreign State to bring to an end to proceedings pending before a foreign court, it would appear more vulnerable to a charge of being an improper interference with sovereignty than an order requiring a judgment debtor to enter into private law transactions to assign or transfer property to a judgment creditor.

Accordingly, although an anti-suit injunction (or an anti-anti-suit injunction) might be a legitimate response to orders made by a foreign court that manifestly exceed customary

international law limits on its jurisdiction and interfere with the English court's ability to exercise its own adjudicatory or enforcement jurisdiction, that line of reasoning merely seeks to excuse the interference with the sovereignty of a foreign State that anti-suit relief unquestionably involves. It does not maintain the, frankly indefensible, position that the anti-suit injunction does not impinge upon the sovereignty of the State to which the foreign court belongs because it binds the defendant personally.

The Court of Appeal's reasoning unravels what can aptly be described as the 'interference paradox'. For the common law to be coherent, the English courts can either (a) continue to assert the power to grant anti-suit injunctions in cases such as *SAS Institute* in order to protect their jurisdiction, and the UK's sovereignty, against 'unwarranted' foreign judicial interference, or (b) maintain their current dogma that anti-suit injunctions that remediate wrongdoing, including breaches of dispute resolution agreements and vexatious or oppressive conduct, operate exclusively on the person/conscience of the defendant and are not objectionable on the ground that they interfere with the sovereignty of a foreign State. These two positions cannot credibly ride in tandem.

The law would also be coherent if the English courts were wholly to abandon the practice of issuing anti-suit injunctions, but that solution exists for now only in the realm of wishful thinking.

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