The tale of a failed preclusion attempt

Prior LCIA arbitration award is found not to bind Quinn Emanuel's client in ongoing Commercial Court proceedings

I. Introduction

In an important judgment handed down on 11 April (available here), Mr Justice Foxton, sitting in London's Commercial Court, rejected an application for a summary judgement in the ongoing Commercial Court proceedings, brought by Bank Otkritie and National Bank Trust, Russian state-controlled Claimant banks (the **Banks**), against Quinn Emanuel's client, Boris Mints (**D1**), and his sons, Dmitry (**D2**) and Alexander Mints (**D3**).[1] Had the application been permitted, it would have resulted in D1-3 being bound, in the current proceedings, by an award in prior arbitration proceedings to which they were not parties.

D1 is a prominent Russian businessman and philanthropist. In 2010, together with D2, D1 founded the O1 Group of companies, active in the real estate and financial sectors in Russia. Since 2013, D1's time has been spent predominantly on philanthropic activities. D1 and his three sons (D1, D2 and Igor Mints (**D4**)) left Russa and are currently living in England, as a consequence of what they say was an unlawful and abusive campaign against D1 and his family by individuals at the Banks, one aspect of which are the Commercial Court proceedings.

The UK imposed sanctions on Bank Otkritie in connection with Russia's invasion of Ukraine on 28 February 2022.[2] Bank Otkritie has also been sanctioned in the US since 24 February 2022.[3]

Foxton J's decision means that D1 will be able to fully defend himself against the allegations brought against him by the Banks for the first time in the Commercial Court proceedings, rather than having to do so with his hands tied behind his back as a result of the prior arbitration award, and thus avoiding what D1 submitted would be a manifestly unjust outcome. It also means the Court has made a positive finding that D1 was not implicated in the fraud in respect of the relevant transaction.

More broadly, the decision is an important reminder of the type of issues that can arise in related proceedings, even as between different parties, and the need to consider, in appropriate circumstances, any potential estoppel and abuse of process arguments as part of one's overall litigation strategy.

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[1] ***PJSC NBT v Mints*** [2022] EWHC 871(Comm)

[2] https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F1070085%2FUK_sanctions_list.odt&wdOrigin=BROWSELINK

[3] https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/24/fact-sheet-joined-by-allies-and-partners-the-united-states-imposes-devastating-costs-on-russia/

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II. Context

The current Commercial Court proceedings were issued by the Banks in June 2019. The Banks claim hundreds of millions of US$ in damages against D1, D2-4, as well as 3 other individuals, alleging that the Defendants are jointly and severally liable for acting unlawfully and in abuse of rights in respect of two transactions involving O1 Group companies concluded in 2017.

D1, in turn, issued a counterclaim, alleging that the Banks engaged in an unlawful and abusive campaign against him and his family, aimed at forcing them to give up their assets, business and lawful rights. The quantum of D1's loss is presently estimated at US$ 650-950 million.

The Banks' application arose out of an LCIA arbitration commenced in January 2018. Those arbitration proceedings comprised a series of consolidated arbitrations brought by three corporate claimants (the LCIA Claimants) against the Banks, as respondents and counter-claimants in the LCIA proceedings.

Importantly, D1-3 were not parties to the arbitration.

In June 2021, the LCIA arbitration tribunal (the Tribunal) handed down its award on liability (the Award), dismissing the claims for declaratory relief made by the LCIA Claimants, and upholding the Banks' counterclaims.

III. The Banks' application

By an application issued in September 2021, the Banks sought permission to re-amend their particulars of claim to plead that each D1-3 is bound by the prior findings of the Tribunal in the Award. The relevant findings related to one of the two transactions subject to the Commercial Court proceedings, which the Banks alleged were entered into at the same time, for the same reasons, and on materially similar terms.

Although, as noted, D1-3 were not parties to the prior arbitration proceedings, the Banks argued that D1-3 should be bound by the findings in the Award because:

1) each D1-3 is a "privy" of the LCIA Claimants, and is accordingly issue estopped from contesting the findings of the Award as against the Banks; and

2) alternatively, irrespective of the privity argument, it would amount to an abuse of the Court's process for D1-3 to contest the relevant findings of the Award in the Commercial Court proceedings.

If permission to re-amend the particulars of claim was given, the Banks also sought summary judgment against D1-3. Accordingly, the Banks invited the Court to summarily determine – without a full trial or hearing the parties' evidence on the contested issues – that D1 (and D2-3) is a privy to the LCIA Claimants and is therefore bound by the relevant findings of the Award, or that challenging those findings would be abusive. The Banks sought to do so despite the fact that the relevant facts are disputed by D1, and in circumstances where (i) allegations of serious wrongdoing

have been brought against D1 for the first time in the Commercial Court proceedings; and (ii) it was not open to D1 to challenge the findings of the Award.

A further feature of the Banks' application was that it sought to group D1-3 together, as if the facts relating to each of them were the same, under the term "Mints Family", used in places in the Award. D1 submitted that, on the proper analysis of the Award, it was clear that that the Tribunal was not satisfied that D1 was involved in the relevant conduct.

Finally, if their summary judgment application was refused, the Banks also sought a "conditional order" requiring D1 (and D2 and D3) to pay c. US$ 478 million into court as a condition of leave to defend the claim.

IV. Overview of the relevant legal principles

Issue estoppel

In general terms, a res judicata (estoppel) is a decision of a judicial tribunal having jurisdiction over the cause of action and the parties that conclusively disposes of all the matters decided, with the effect that those matters cannot be relitigated by the parties, except on appeal.

Res judicata is a rule of substantive law. By contrast, abuse of process is concerned with the exercise of the court's procedural powers.

Issue estoppel, which has existed since at least 1776,[4] is a form of res judicata.

Three requirements must be established for an issue estoppel to arise:

1) identity of parties: the previous proceedings must have been between the same parties as are parties to the subsequent proceedings, or their privies;
2) the previous judgment must be that of a court of competent jurisdiction, and final and conclusive on the merits; and
3) identity of issue: the issue decided in the previous proceedings must have been clearly decided, essential to the prior decision and the same as an essential issue for decision in the later proceeding.

It is generally accepted that an issue estoppel can arise between the parties to an arbitration award, which can then be relied on if there is an attempt to relitigate that issue between those parties in court proceedings.

Further, following the 1977 Gleeson decision,[5] a court judgment may bind not only the parties themselves, but also their "*privies*" – referred to by Foxton J as "*Gleeson privies*".

In Gleeson, Megarry VC held that the concept of privy extended not only to the parties' successors in title, but also a wider class of persons where "*having due regard to the subject matter of the*

[4] ***Duchess of Kingston's Case*** 168 ER 175
[5] ***Gleeson v Whipple & Co*** [1977] 1 WLR 510

dispute, there [is] *a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party should be binding in proceedings to which the other is party*".

The "*sufficient degree of identification*" test has been criticised for being "circular", and Megarry VC himself described the concept of privity as "protean".

Abuse of process

The concept of abuse of process is a rule of public policy aimed at ensuring that litigation does not drag on forever, and that a defendant is not oppressed by multiple successive suits. The concept is based on the premise that the Court has an inherent power to prevent the abuse of its procedures by actions which, albeit not involving an express breach of the rules, would nevertheless be abusive.

While abuse of process may arise from an attempt to relitigate an issue determined in other proceedings where there is no issue estoppel, this will be a rare case requiring special circumstances. In particular, where the parties in the later proceedings were neither parties nor their privies in the earlier proceedings, an abuse will only arise if it would be *"manifestly unfair to a party to the later proceedings*", or "*bring the administration of justice into disrepute*".[6]

V. The Court's decision

Can a prior arbitration award bind Gleeson privies?

Foxton J first considered whether arbitration awards (as opposed to court judgments) are capable of binding Gleeson privies.

The Judge did not accept that the contractual source of the tribunal's jurisdiction meant that the ability of the award to generate an issue estoppel was confined to the parties to the arbitration agreement or their contractual privies (i.e., their successors in title, or those engaged in the derivative exercise of the relevant contractual right), noting in particular that the question of who is bound by the arbitration agreement, which is contractual in nature, is not the same as the question of who is bound by an award, which engages wider public interests of finality. Nevertheless, Foxton J considered that "*the contractual source of an arbitral tribunal's substantive jurisdiction … is one of a number of reasons why any attempt to establish the preclusive effect of an award against anyone except the parties or their contractual privies will be an extremely challenging task*".[7]

The Judge therefore considered that a prior arbitration award is capable of binding Gleeson privies in subsequent proceedings – but the contractual nature of arbitration will make the task of establishing an issue estoppel very difficult in these circumstances. This conclusion is hardly surprising, given that the contractual nature of arbitration limits the ability of non-parties to participate in the arbitration, and to challenge any award rendered by the tribunal.

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[6] ***Secretary of State for Trade v Bairstow*** [2003] EWCA Civ 321; [2004] Ch 1 at [38]

[7] ***PJSC NBT v Mints*** [2022] EWHC 871(Comm) at [26]

Guidance on the application of the Gleeson test

While describing the Gleeson test as "conclusory" and "multi-factorial" (rather than "rule-based"), Foxton J identified certain "signposts" aiding its application, noting in particular that the test for "identification" is sometimes approached by asking if the party sought to be bound can be said "in reality" to be a party to the original proceedings.[8]

That test needed to be approached with caution, however, given the principle of a distinct legal personality of a company, and the fact that natural persons who can be said to "control" a company will often have a commercial interest in its success.

Foxton J also rejected the suggestion that the ability to join a party to the original proceedings is necessary for privity to apply, albeit accepting that this will be a relevant consideration.

D1, and D2-3, are not "privies" of the LCIA Claimants

Foxton J declined to find that any of D1-3 were privies of the LCIA Claimants, saying that he could not determine all of the relevant underlying issues on a summary judgment basis. That included the question of whether D1-3 were the "moving spirits" behind the LCIA Claimants' decision to commence the arbitration proceedings.

In addition, the Judge found that it was not arguable that there was any clear strategy or intent on the part of D1-3 to procure findings in the LCIA arbitration which would be legally determinative as between the Banks and themselves. He also determined that it was the Banks who were previously proceeding on the basis that the Award would not be determinative in the Commercial Court proceedings.

Significantly, Foxton J not only declined to determine the issues contended by the Banks in their favour, but also refused the Banks' application for permission to amend their pleadings.

Given these conclusions, Foxton J considered the question of whether the issues in the Commercial Court proceedings were the issues already determined in the LCIA arbitration relatively briefly. Importantly for D1, the Judge agreed with the submission of Philip Edey QC on behalf of D1 that the Award "*did not arguably contain any finding of the requisite clarity that D1 had held the knowledge or dishonest state of mind alleged against him in these proceedings*", and stated that he would have refused permission to plead an issue estoppel case against D1 "*in any event*". Foxton J also stated that he did not accept that the reference to "the Mints family" being party to a conspiracy extended to D1.

No abuse of process

As far the Banks' alternative abuse of process case is concerned, those arguments were also rejected by Foxton J, who concluded that there was no abuse of process in D1-3 raising issues in their defences which were inconsistent with the findings in the Award, in circumstances where he determined that it was not arguable that D1-3 were privies of the LCIA Claimants.

[8] *Ibid* at [33]

It was clear from the relevant authorities that caution needed to be exercised before finding that prior determination in an arbitration award makes it an abuse of process for a non-party to seek to raise a particular issue in subsequent litigation. This was succinctly summarised by Simon LJ in Michael Wilson, where he stated that it would be "*perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process*".[9]

Foxton J observed that, while the Banks failed to identify any special feature of the case that would justify the finding of abuse, D1-3 pointed to a number of strong reasons why there was no abuse of process. This included the fact that D1-3 were not parties to the LCIA arbitration agreement; that they were seeking to defend the Banks' claims, rather than themselves actively engaging the Court's jurisdiction to obtain substantive relief;[10] and that the Banks were clearly reserving their right to advance a case which was inconsistent with the LCIA Award – a point described by Foxton J as "highly material".

The Banks' conditional order application refused

In respect of the "conditional order" sought by the Banks, Foxton J found that it was not open to the Court to make such an order, given that the relevant issues of Russian law, which the Banks' claims in the Commercial Court proceedings are subject to, were not considered by the Court as part of the Banks' application. The Court was therefore unable to conclude that it was "improbable" that D1-3's defences would succeed, per the relevant test in CPR 24.

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If you have any questions about the issues addressed in this memorandum, please do not hesitate to reach out to:

Matthew Bunting
Email: matthewbunting@quinnemanuel.com
Phone: +44 20 7653 2020

Anna Parfjonova
Email: annaparfjonova@quinnemanuel.com
Phone: +44 20 7653 2076

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[9] ***Michael Wilson & Partners Ltd v Sinclair*** [2017] 1 WLR 2646 at [68]

[10] Aptly illustrated by Foxton J by quoting the words of a traditional French song at [77]: "*ce chien est très méchant; quand on l'attaque, il se défend*" – "*this dog is very naughty; when attacked, it defends itself*".