CIVIL APPEAL NO. 2 OF 2007

Between:

OneBeacon America Insurance Company
(Formerly commercial Union Insurance Company (CU))
Appellant

And

Peter CB Mitchell, David Lines and Christopher Hughes As Joint Liquidators of
Electric Mutual Liability Insurance Company Limited
(EMLICO)
Respondents

Before: **Nazareth, JA**
Evans, JA
Forte, JA

Date of Hearing: 19th – 21st November 2007
Date of Judgment: 29th November 2007

Evans, JA

1. A large number of legal proceedings has grown out of the insolvency in 1995 of Emlico, a captive insurance company formerly owned by the General Electric Company of the United States. This judgment will not repeat the history, which has been set out in many judgments including that of the Chief Justice dated January 2007 from which this Appeal is brought, and that of this Court dated 17 March 2006 which was concerned with a different issue.

2. The relevant outline is as follows. In the early 1990s, GE claimed an indemnity from Emlico as its insurer under a long sequence of general liability policies dating back more than thirty years. The claim was in respect of costs and liabilities it had incurred by reason of what are classified as (1) asbestos claims, and (2) environmental, or clean-up losses, at various sites across the United States and in Puerto Rico. There were more than 500 such sites, and the total claim representing costs already incurred and likely future costs is of the order of $4 billion.

3. These proceedings are concerned with only a small fraction of that sum, perhaps 2.5 per cent, or $100 million representing the potential liability of CU as a reinsurer of Emlico. This Court has already expressed its concern lest the legal and related costs are

becoming disproportionate to the amount in issue (Judgment dated 17 March 2006 para.63) and the present proceedings have done nothing to dispel those doubts.

4. In this appeal, as previously, what was essentially a straightforward and relatively simple procedural issue has been allowed to become the vehicle for a wide-ranging rehearsal of the parties` grievances, old and new, and a repeat of earlier battles either already lost or subject to pending appeals in other jurisdictions. One service which this Court can render is to confine this judgment to the material facts and relevant issues, and to urge the parties to do likewise in all future proceedings which may come before the Bermuda Courts.

5. Emlico was incorporated in 1927 in the State of Massachusetts, USA. Faced with GE`s massive claims, its Board embarked a scheme which resulted in Emlico being "re-domesticated"(relocated) in Bermuda. Other claims and assets were hived off into another Massachusetts company, leaving Emlico with GE as its only creditor and its reinsurances as its only assets. Promptly after its incorporation in Bermuda, Emlico declared itself insolvent, and in July 1995 three Joint Liquidators were appointed by this Court.

6. The arbitration Panel found that the redomestication was obtained by fraud, namely, by deceitful statements as to its solvency made on behalf of Emlico to the authorities in both Massachusetts and Bermuda. The Panel`s Ruling is binding as between Emlico and CU though both parties are seeking to have it reviewed by the Courts of the Second District of New York.

7. GE took no proceedings against Emlico until recently, as will appear below. GE did, however, commence actions in New York against a number of Excess insurers (i.e. under direct insurances covering liabilities in excess of agreed amounts) which included CU. Meanwhile, faced with GE`s claims, the JLs, first, commenced arbitration proceedings against CU (and other reinsurers), also in New York, and secondly, they instructed a well-qualified and experienced U.S. lawyer, Margaret Warner, to head of a team charged with investigating GE`s claims and reporting to the JLs. Their intention was that the Report would provide the basis for an agreed settlement, or it would assist the JLs to fix the amount for which GE was entitled to prove in the liquidation. Ms. Warner headed a wide-ranging inquiry and produced her report in 2005.

8. The New York Arbitration Panel made a series of Rulings/Awards in 1997/2003. It upheld CU`s contention that the redomestication was procured by fraud, but it rejected the claim that the reinsurance contract should be rescinded on that ground. Instead, it ruled that the amount of any recovery by Emlico would be "adjusted" if CU`s liability as reinsurer proved to be greater than it would have been, if Emlico had remained in Massachusetts and the liquidation had been conducted there. The essence of CU`s contention was that a Massachusetts liquidation would have been administered by an independent Receiver who could be relied upon to ensure that GE`s claims were objectively assessed, whereas the Board of Emlico had considered that a Bermuda liquidation was more likely to give effect to the views of the company`s creditors, GE.

This was the basis of the Panel`s finding that CU might be "worse off" as the result of Emlico`s move.

9. In the proceedings which are pending in the Southern District Court in New York, the Panel`s refusal to grant rescission of the reinsurance contract and its Ruling that any recovery by Emlico might be "adjusted" as described above are both under challenge. Possible outcomes of a hearing which is scheduled for March 2008 are, subject to further appeals, (a) the reinsurance contract may be rescinded, thus releasing CU from all liability in respect of the environmental claims, or (b) the refusal of rescission may be affirmed, with or without approval of the adjustment formula. Different issues arise in respect of the asbestos claim, which we need not consider here.

10. The contents of Ms. Warner`s Report have been released to CU but not in full to GE. Apparently this is for reasons of privilege which we do not fully understand, and it has resulted in parts of the evidence being redacted as regards GE, but not CU. This unusual arrangement is accepted by the parties to the Appeal, and despite the Court`s misgivings the appeal has proceeded on that basis.

11. For so long as the reinsurance contracts remain binding, CU has rights against Emlico and the JLs under so-called "Interposition" clause. This entitles it to intervene in any proceedings brought against Emlico by GE as its insured. In 2004, the JLs contended that the extent of CU`s rights under the clause could only be established by a further reference to the arbitration Panel, but this Court held that the practical scope of the interposition rights depends upon the Court which hears the proceedings in which the rights are sought to be exercised, and that in any event the Panel had already given every indication that it expected the Bermuda Courts to apply the clause in that way.

12. In summary, therefore, when this Court`s judgment was handed down in March 2006, the parties` respective positions were as follows. CU contended that Emlico`s relocation from Massachusetts to Bermuda, and its liquidation there, meant that CU was "worse off" under its reinsurance contract because the JLs were able to respond to GE`s claims in the liquidation more favourably than the independent Receiver in Massachusetts would have done, and the JLs were likely to do this. Therefore, the redomestication in Bermuda had deprived CU of this independent safeguard. The JLs asserted that as officers of the Court they were under a duty to act impartially in respect of the claims, and that they would seek either an agreed settlement, necessarily on a tripartite basis with CU also, or they would themselves determine the amount for which GE is entitled to prove in the liquidation, as they were entitled to do. They said that they had commissioned Ms. Warner`s Report as a preliminary to either course, and that litigation was unnecessary or at least would be premature.

13. Soon after the judgment was handed down, all that changed. The JLs concluded that an agreed tripartite settlement could not be achieved, in particular because neither GE nor CU appeared willing to agree a settlement based on the Warner report. They also decided that litigation to establish the amount of GE`s claims had become inevitable, and that it

should take place in Massachusetts. On 21 July 2006, therefore, they issued a Summons claiming Directions in the following terms –

> "1. The Joint Liquidators ("JLs") of EMLICO do have liberty to commence or permit to be commenced, in the state court of the State of Massachusetts, USA (the "Massachusetts Court"), proceedings by or against Emlico (the "Proceedings") and submit to the jurisdiction and venue of such Court for the purpose of ascertaining whether any, and if so what, sum is due to GE from EMLICO under the terms of insurance policies issued to GE by EMLICO.
> 2. The statutory stay imposed by section 176(5) of the Companies Act 1981 be lifted if and to the extent necessary for the purpose of the Proceedings.
> 3. The JLs shall rely upon any judgment obtained in the Proceedings for the purpose of determining the claim by GE against EMLICO under the terms of insurance policies issued to GE by EMLICO (the "GE Claim").
> 4. In complying with paragraph 1 above, the JLs will recognise and give effect to the contractual rights of CU pursuant to the relevant reinsurance contract including the right to interpose defences in the Proceedings.
> 5……."

14. The Summons was supported by the Second Affidavit of Christopher Hughes, the distinguished Chartered Accountant who is one of the JLs and speaks for them. He said that essentially there were four reasons why the JLs had decided that litigation of the GE claims was inevitable and why they sought leave "to commence or permit to be commenced" proceedings in the State Court of Massachusetts. First, both GE and CU were unwilling to contemplate a settlement on the basis of the Warner Report. (Although GE had not seen the Report, apparently they were aware that it proposed a lower figure than they were prepared to accept.) Secondly, litigation in Massachusetts would establish the amount due from Emlico to GE, and it would take place in the forum for which CU had contended throughout the many stages of the 'redomestication' proceedings. Thirdly, restoring the litigation to the Courts of Massachusetts would "duplicate as nearly as possible what would have happened if EMLICO had not redomesticated in Bermuda, thus decreasing the likelihood of the New York District Court vacating the Phase 1 Award [meaning the Panel`s refusal of rescission and its 'adjustment' formula], and removing the need for the Panel to make any adjustments in the later phases of the arbitration" (Judgment para.12). Fourthly, the matter could be dealt with more quickly and efficiently before the Business Section of the Massachusetts Superior Court than it would be <u>by the Bermudian Court</u> (emphasis supplied). The JLs made this comparison because they anticipated that, if GE were to challenge their decision as to the amount of GE`s proof in the liquidation, that challenge would be made by means of contested proceedings in Bermuda.

15. The JLs effectively were conceding what they thought CU wanted, namely, litigation in Massachusetts with provision for CU to exercise its interposition rights, and Mr Hughes acknowledged later that he had hoped that CU would welcome the application. In

fact, CU did welcome the JLs` acceptance that litigation was necessary and that it should take place outside Bermuda. But CU contended that the venue for the litigation should be New York rather than Massachusetts. This raised a new issue which apparently had not been considered by the JLs who, as noted above, had compared Massachusetts only with Bermuda. But this was the only difference between them, and the only issue for the Court to determine on the hearing of the Summons.

16. CU set out its reasons for preferring New York to Massachusetts, including a number of grounds relevant to a conventional choice of *forum conveniens*. In particular, it asserted that New York law offered the insurer, namely EMLICO itself, a number of defences which were not available to it under the laws of Massachusetts, and that New York law was the proper choice of law for all or the majority of GE`s claims. Better, therefore, CU contended, to have the claims litigated in New York where that law would be applied. The potential reduction in EMLICO`s and therefore in CU`s liability was said to amount to 'some hundred of millions of US dollars'. These assertions were largely taken from the Warner Report which had analysed the claims in considerable detail, as regards both their legal and factual aspects.

17.The JLs in reply marshalled a number of substantial reasons, supported by further evidence, why Massachusetts rather than NewYork was the appropriate venue, even when the matters relied upon by CU were taken into account. But they went much further, and regrettably it was at this stage that the mutual suspicions and antagonism generated by years of forensic conflict came to the fore. Mr.Hughes` Third Affidavit ran to 51 pages, three times as long as his Second, and he went so far as to accuse CU of bad faith (paragraphs 17 and 111) although acknowledging elsewhere that CU was acting in its own commercial interests as it saw them (paragraph 59).

18. The greater part of Mr. Hughes` Third Affidavit is a reiteration of the reasons why the JLs had concluded that GE`s claim should be litigated in Massachusetts. He summarised these in paragraph 83 –

> "…the JLs remain of the view that Massachusetts is the appropriate court in which the proceedings should be issued. Litigation in Massachusetts will ensure that the GE Claim, if it is a good claim, is admitted for a proper amount. Furthermore, CU`s ability to continue to argue that it has been prejudiced by the redomestication from Massachusetts to Bermuda will best be reduced if proceedings are issued in that forum. Litigation in Massachusetts will also best ensure that the GE Claim is determined in an efficient and timely manner."

He went on to rebut CU`s contention that a New York Court was more likely than the Massachusetts Court to apply New York law as the substantive law governing the claims ("Securing a New York Choice of Law Determination as the Justification for Coverage Litigation in New York" paragraphs 84-91). He challenged CU`s reliance on the Warner Report (paragraphs 92-95) and then considered the "Comparative Efficiency of Litigating the GE Claims in New York or Massachusetts". Meanwhile, in paragraph 97 he reverted to what the Chief Justice later identified as the JLs` primary reason – "CU`s ability to

continue to argue that it has been prejudiced by the re-domestication from Massachusetts will best be reduced if litigation takes place in Massachusetts…..".

19. The Third Affidavit also contended that the Bermuda Court should not concern itself with 'choice of forum' issues because these could be raised by CU before the Massachusetts Court (paragraphs 13 and 61-63), and that CU`s rights under the interposition clauses do not entitle it to choose the forum in which the relevant proceedings are issued (paragraph 34(a)).

20. To complete the history, on the same day as the JLs` Summons was issued in Bermuda, GE issued proceedings against Emlico in the Business Session of the Massachusetts Superior Court. These are not referred to in either of Mr. Hughes` Second and Third Affidavits. The fact that GE had taken this step meant that the Directions sought by the JLs were inappropriate. There was no longer any question of the JLs needing to "commence…… proceedings by…….Emlico", nor any need for them to "permit……proceedings…against Emlico" or to "submit to the jurisdiction and venue of such Court" – unless there was some doubt as to whether the Court would allow GE to bring proceedings there, without the JLs consenting to them. How much Mr. Hughes knew of this when he made the Affidavits is a matter to which we shall return below. For immediate purposes, it is sufficient that (1) CU has not suggested that the apparent withholding of relevant information provides a ground for dismissing the Summons, and (2) the Chief Justice was made aware of it before the Summons was heard. He referred to the GE procceedings in paragraph 9 of his Judgment, and we were told that he was critical of GE for taking that step without first obtaining leave or at least informing the Court under the relevant statutory provision.

The Chief Justice`s Judgment

21. The Chief Justice considered first the issue as to whether CU`s interposition rights entitle it to choose the forum, which logically comes first because if determined in CU`s favour it might dispose of the matter (paragraph 13). He rejected CU`s contention, holding that CU would be able to raise any defences which might flow from the choice of New York law, whether the proceedings were in Massachusetts or New York (paragraph 14). This ruling was not explicitly appealed against and in any event we agree with it. We need say no more about this issue.

22. He next considered the JLs` "primary reason" for proceeding in Massachusets, which was that Massachusetts proceedings would replicate (or approximate) what would have occurred in a Massachusetts liquidation, which "they say…. is the best way to preclude further argument by CU in the New York confirmation proceedings [i.e. in the New York District Court] and before the Panel" (Judgment para.16). The Chief Justice quoted from the JLs` written Submissions –

> "The overriding reason for and purpose of the present application is therefore to ensure that CU will no longer be able to contend that it has been prejudiced by the fact that EMLICO redomesticated from Massachusetts to Bermuda."

23. He dealt with this issue in paragraphs 17-20 of his Judgment. First he referred to statements made by the Second Circuit Court of Appeals in remitting to the District Judge

the proceedings to confirm or vacate the arbitration Panel`s Award, and by the District Judge when he considered the remission. The remission was to enable the District Judge to consider "whether liquidation in Bermuda – which followed from redomestication in Bermuda – could affect the results of the arbitration, and whether confirming the arbitral Awards …… would violate the Court`s equitable principles". This Direction clearly is relevant to the questions whether the Panel`s refusal to rescind the reinsurance contracts should stand, and whether CU`s liabilities as reinsurer have been affected by the fact that the liquidation is being conducted in Bermuda, not Massachusetts, so as to give rise to the need for the kind of "adjustment" which the Panel had in mind. Following the remission, the District Judge, in the Chief Justice`s words, "expressed concerns about the difficulty of undoing the effects of redomestication", and he had asked "Is it impossible to move back to Massachusetts and start over". The Chief Justice continued "It is that last suggestion to which the JLs say they are responding by the directions that they now seek [by their Summons in this Court]".

23.In paragraph 19 of his judgment, the Chief Justice summarised the issue in this way –

> "19. While I can see the force in such a strategy, CU protests that it will not work, because it is exposed to litigation in Massachusetts, which will therefore, it argues, breach its interposition rights. I cannot predict the outcome of such an argument……..nor is it appropriate for me to try. It does however mean that the JLs` strategy will not necessarily avoid future controversy."

24. He reverted to this same point in a different context in paragraph 28. He said that CU was threatening to argue before the District Judge in New York and before the Panel that litigation in Massachusetts had denied its interposition rights. He continued –

> "However, that is a risk that both JLs and GE are aware of and willing to take. I am quite unable to second-guess the tactical considerations in all of this, particularly given CU`s previous stance in favour of litigation in Massachusetts. Nor do I think it appropriate for me to try; that is a matter for the professional judgment of the JLs."

25. We note the change that had occurred in the JLs` position. Initially, they suggested that CU`s apparent willingness to litigate in Massachusetts was a reason for the Court to direct litigation there, because CU would not then be able to claim that it had been denied the rights it claimed in respect of venue. However, when CU contended for New York, the JLs were prepared to take the risk that denying CU its choice of venue might reduce their chances of making reinsurance recoveries.

26. The Chief Justice then held that the JLs` reason was valid, even compelling. He said –

> "20. There is, however, another simpler reason for attempting to replicate what would have occurred in a Massachusetts winding-up, which I understood Mr. Dicker for the JLs to advance in his closing argument, and that is that it ensures that no-one benefits from the redomestication. He described it as the "principled approach". I find that compelling, although I would prefer to express it more widely, and say that the fairest way to resolve the conflicting interests and competing duties, insofar as they relate to the choice of forum, is to put the parties

as near as possible back in the position they would have been in in that regard had the redomestication not occurred."

27. That made it necessary for him to say what the position would have been in an insolvent liquidation in New York. He concluded that on the evidence the overwhelming likelihood was that "if EMLICO had gone into insolvent liquidation in Massachusetts, then GE`s claim, if not otherwise resolved, would have been dealt within the normal way by litigation in the Massachusetts Superior Court" (paragraph 25). He added that CU would remain free to maintain a *forum non conveniens* argument before the Massachusetts Court (paragraph 26).

28. He then asked "Are there any factors which militate against Massachusetts? There is no suggestion that Massachusetts would be an unsuitable court in any practical sense. Indeed the evidence is all the other way, and is to the effect that its Business [Session] will provide an efficient forum in which to resolve a complex dispute of this nature." He rejected CU`s suggestion that proceedings in New York might be consolidated with existing proceedings by GE against its Excess insurers (including CU), which have been underway since 1996, as a recipe for confusion and (further) delay (paragraph 27).

Submissions

29. We note the following from the parties` submissions at the hearing of the Appeal. Mr. Pascoe QC for CU stressed that, given the defences available to Emlico under New York law, which the New York Court would be expected to apply, no rational insurer would accept the risk that the Massachusetts Court might decide to apply its own law, even if it adopted conventional "choice of law" principles. The JLs representing Emlico therefore could not justify incurring that risk. Moreover, if the JLs really were seeking to minimise the risk that CU would contend that its interposition rights had been denied to it, they would be in a stronger position to resist those arguments if the claims had been decided in the venue of CU`s own choosing.

30. Mr. Dicker, QC for the JLs, defined their duty as officers of the Court by reference to *Ex parte James* (1874)LR 9 Ch App 609 and the principles recently restated by Lindsay J. in *Re Collins & Aikman Europe SA* [2007] 1 BCLC 182. It has been described as an "elusive and difficult principle .. based on morality" (see p.188i) and it was summarised by Mr. Dicker as including a duty to act "quasi-judicially and impartially" between the competing interests of GE and CU. He submitted that the duty was to admit GE`s claims "in a proper amount" but not necessarily to seek the lowest amount, and in particular it is not their duty to engage in `forum shopping`.

31. Mr. Trower, QC for GE, supported the JLs choice of Massachusetts jurisdiction and he submitted that the Court should uphold it unless it was "perverse", just as this Court should not interfere with the Chief Justice`s discretionary ruling except by applying the same test. GE was not a party to the redomestication fraud alleged (and found) against Emlico, and GE had its own interest in safeguarding Emlico`s sole remaining asset, namely, its reinsurance claims. He further submitted that CU has no legal interest in the JLs` present applications, but he acknowledged that CU has a contractual right to be heard on the JLs` application (cf. Judgment para.14).

Discussion

32. When CU raised the issue whether litigation outside Bermuda should take place in New York, not Massachusetts, but otherwise did not dissent from the JLs` Summons, it became necessary for the Bermuda Court to decide what the choice of forum should be. True, the JLs suggested that if the Court did not approve of their choice, the matter should be remitted to them, but that did not relieve the Court of the duty to decide whether to approve their choice, or not. The Chief Justice proceeded on that basis, and so will this Court.

33. The choice of forum can be made by the application of well established principles for identifying a *forum conveniens* or, more often, for rejecting an allegation that the domestic jurisdiction is *forum non conveniens*. It is submitted here that the application of those principles should be left to the Massachusetts Court applying its own rules, or to the New York Court if the need were to arise, but we do not understand how that can provide an answer to the question whether this Court should approve proceedings in Massachusetts or New York. That is the issue which CU has raised, and the fact that Massachusetts is the JLs` choice does not answer the question. No other jurisdiction has been suggested except Bermuda, which the JLs considered only to reject, and the other parties do not dissent.

34. Apart from what the Chief Justice described as the JLs` primary reason, which is to replicate as far as possible what would have occurred if Emlico was being wound up in Massachusetts where it was previously incorporated, the factors relevant to a conventional choice of *forum conveniens* are dealt with in the evidence and most were referred to by Chief Justice. In short –

(a) Emlico carried on business in Massachusetts throughout the relevant period;
(b) the relevant policies of insurance were issued to GE and administered there;
(c) a significant number of the sites relevant to the environmental claim is situated in Massachusetts;
(d) the Massachusetts Court will give effect to New York law where that is the correct choice of law in relevant circumstances; and
(e) the Business Session of the Massachusetts Superior Court is well able to provide an efficient and relatively speedy outcome, even (or perhaps especially) in complex litigation of this sort. Litigation in New York, on the other hand, would be a recipe for confusion and delay, if fresh proceedings issued by GE were consolidated with those against its Excess insurers, and would come before a Court under extreme pressure of business, in any event.

35. The Chief Justice`s finding referred to under (d) above rejected CU`s main reason for contending that New York should be the preferred venue. On this basis, the additional defences available to Emlico under New York law can be relied upon in Massachusetts also.

36. We agree with the Chief Justice`s findings and indeed apart from (d) and (e) they were not disputed by CU before us. If, therefore, the issue is presented as requiring a straightforward application of *forum conveniens* principles, in our judgment his

conclusion in favour of Massachusetts and rejecting the suggested New York alternative was correct.

37. We must also consider, however, his principal finding that "the fairest way to resolve the conflicting interests and competing duties, insofar as they relate to the choice of forum, is to put the parties as near as possible back in the position they would have been in in that regard had the redomestication not occurred" (Judgment, paragraph 20).

38. In our judgment, the Chief Justice was wrong to adopt this approach. This is for a number of specific reasons, and because more generally in our view it is not the function of this Court in winding up Emlico either to attempt to "streamline" the current proceedings in the New York Courts arising out of the Panel`s Award (Mr. Hughes` phrase in his Third Affidavit paragraph 53) or to "second guess the tactical considerations in all of this" (which the Chief Justice warned against in paragraph 28 of his judgment, quoted above).

39 The specific reasons are these. The JLs` contention, which the Chief Justice adopted, fails to distinguish between proceedings in the Massachusetts Court conducted as private litigation between GE and Emlico, with CU intervening pursuant to its interposition rights, and proceedings which would or might have occurred there if Emlico was being wound up under Massachusetts law by the independent Massachusetts Receiver who would have conducted the litigation, if litigation became necessary, on behalf of Emlico. That situation cannot be recreated, and to attempt to do so is in effect to undo the redomestication, which noone has suggested can be done. The New York District Judge` exclamation "Is it impossible to move back to Massachusetts and start over?" (quoted in paragraph 18 of the Judgment, see above) has to be answered, "Yes, it is impossible, and none has suggested it."

40. Whether this Court should attempt to "replicate" the situation which would or might have arisen, if the redomestication had not occurred, is a different matter, which raises at least two further questions. First, is it relevant to the winding up of Emlico by the Bermuda Court that the company was previously incorporated in Massachusetts? We cannot see that this fact of history is of any relevance, of itself, to the present issue as to where proceedings between GE and Emlico should now take place (though incidental facts such as Emlico`s former place of business are relevant to the issue of *forum conveniens*, as discussed above). It only becomes relevant or potentially relevant if the fact of Emlico`s involvement in pending arbitration and Court proceedings is taken into account. If that is done, and if the Panel`s Award stands, it may become necessary for the Panel in due course to assess what the outcome as regards the reinsurance claim would have been, if the redomestication had not occurred and the liquidation had been conducted in Massachusetts. But that will only become necessary when the Panel knows the actual outcome of the Bermuda winding up and has decided what CU`s liabilities under the reinsurances are, subject to any "adjustment" derived from the actual (Bermuda) and hypothetical (Massachusetts) windings up. If the Bermuda winding up is affected by

considerations of what the Massachusetts result would or might have been, that will not be what the Panel had in mind.

41. The only basis, in our view, on which it can be said that the Bermuda Court, and the JLs who are winding up Emlico as officers of the Court, can have regard to the fact of its previous incorporation in Massachusetts, is that, by virtue of the Panel`s Award, Emlico is exposed to a risk that its insurance recovery against CU will be reduced, if CU is "worse off" in consequence of the liquidation taking place in Bermuda. Therefore, the JLs can argue, it is in Emlico`s interests to prevent or reduce any such loss being suffered by CU, by ensuring that the GE claims are litigated in the Massachusetts Court, as they would have been. This they justify by reference to their duty to preserve Emlico`s assets, namely its reinsurance recoveries, to their full extent. Apart from this argument, in our judgment, there was no justification for taking account either of Emlico`s previous incorporation in Massachusetts or of the possible outcome if it had been liquidated there.

43. And we are doubtful whether the argument is correct. The amount of Emlico`s reinsurance recovery will be determined by the arbitration Panel in the light of all the circumstances known to it, including (as it has ruled) Emlico`s previous misconduct. It seems to us that this Court, and the JLs, ought not to be influenced in their choice of the proper venue for the litigation of GE`s claims by the consideration that the Panel`s Award may make it necessary at some future date to determine whether Massachusetts litigation conducted by the Receiver would have resulted in a lower reinsurance recovery against CU. (We understand that the Panel will only "adjust" the amount of the recovery downwards, if CU`s 'actual' liability is greater than it would have been, redomestication apart. If that is correct, the JLs are seeking to replicate Massachusetts proceedings in order to reduce, not increase, the amount of Emlico`s reinsurance recoveries. Moreover, the object of readjustment will be to reduce the reinsurance recovery to what it would have been, if the redomestication had not occurred. However, the ramifications are endless.)

Conclusion

43. If the views we have expressed above are correct, this Court is entitled to set aside the Chief Justice`s Order on the ground that he gave weight, indeed precedence, to a non-relevant factor, and it could then proceed to exercise the Court`s discretion afresh. However, for the reasons given above, we consider that the Chief Justice`s choice of Massachusetts over New York was entirely justified on *forum conveniens* grounds, and in our judgment his Order should stand.

44. We should record that Mr. Dicker, for the JLs, objected to this Court exercising its discretion by applying *forum conveniens* principles, if it were to accept CU`s contention that there were grounds on which the judgment could be set aside. He suggested that the matter should then be remitted to the Chief Justice so that further evidence might be produced. It seems to us that all parties had had every opportunity to address that issue, and in any event we can assume that the JLs do not object to the course we have taken.

General observations

45. This Court gave leave in the course of argument for CU to produce further evidence (Mr. Howard`s Seventh Affidavit) in response to a document produced by GE in the closing stages of the hearing before the Chief Justice and referred to in a footnote to his judgment, (paragraph 9). These are factual matters which we have not found it necessary to include in this judgment.

46. We have taken the view that when CU responded to the JLs` Summons it was apparent that the only issue raised was the question of venue and that the scope of the proceedings could be limited to that. Instead, they have been widened to include the whole history and background, as we have indicated above. The same happened when CU`s 2004 Summons was objected to on the ground that the arbitration Panel not the Court should determine the extent of CU`s interposition rights, and that matter came before this Court. We have said enough to indicate that in our view, when applications are made to this Court, the evidence and submissions should be strictly confined to what is relevant to the issues. And we hope that any future proceedings before this Court will not be marred by allegations of bad faith and improper conduct, as these have been.

47. We have left until last a matter which has given us considerable concern. It is the fact that GE commenced proceedings in Massachusetts on the same day as the JLs applied to this Court for Directions which appeared to relate to proceedings which the JLs intended to commence in Massachusetts, or in which they would be required to submit to the jurisdiction of that Court. The JLs did not bring this to the attention of this Court, although we were told that at some stage the Chief Justice criticised GE for issuing proceedings without applying to the Court for leave to do so.

48. In their response to the Summons, CU commented on the "surprisingly synchronised coordination" between the issue of the JLs` Summons in Bermuda and GE`s proceedings in Massachusetts. Mr. Hughes replied somewhat disingenuously as follows –

> "The JLs did not indicate their consent to, or support the filing of, GE`s Complaint. The Jls are not, however, surprised that GE was ready to take action by the end of July. The JLs were not operating in secret. As I said in my SecondAffidavit at paragraphs 11 and 12, both CU and GE were given notice of the JLs` proposal of Massachusetts litigation months before the filing of the July [i.e.the JLs`]Application." (paragraph 113).

49. This carefully drafted paragraph did not reveal whether the JLs knew that GE was about to issue proceedings in Massachusetts, a matter which was clearly relevant to their application to the Court. In the paragraphs he referred to in his Second Affidavit, Mr. Hughes said this –

> "11. The JLs wrote to CU on 27 April 2006 explaining that we intended to make the present application……..To date CU has not provided me with any substantive comment on the present application…..
>
> 12. The JLs also wrote to GE on 3 May 2006 explaining that we intended to make the present application. I subsequently met with GE and its advisers, to discuss the possibility of the Massachusetts Court resolving the GE Claim with CU

having conduct of EMLICO`s defences. I have since been advised by GE that it is generally supportive of the present application."

50. The clear inference from what is known to this Court, including the above, is that there was some degree of collusion between the JLs and GE and their respective advisers during the period before the Summons was issued, and that the JLs had notice of GE`s intention to issue proceedings in Massachusetts. The JLs failed to clarify this when they were asked to do so (Mr. Hughes` Third Affidavit, above), and counsel accepted that the Court could properly draw the inference stated above. This has two consequences –

(1) as regards the present proceedings, it should not be necessary for the Court to repeat that when there is a failure to make full disclosure of relevant facts or a lack of frankness in supporting affidavits, the Court is entitled to refuse any Application, regardless of its underlying merits; and

(2) the JLs` duty to the Court, as defined by their leading counsel, is to act quasi-judicially and impartially as between, in the present case, GE as creditors and CU who the JLs contend bears ultimate liability for GE`s claims. The duty cannot mean that they are not entitled to communicate with GE and CU individually, but any degree of collusion with either party without notice to the other may risk their impartiality being called in question, particularly where as here it has been the substance of CU`s complaints since 1995 that the object of the redomestication was to enable liquidators of Emlico to admit GE claims in greater amounts than an objective assessment would allow. We feel justified in reminding the JLs of this in the present circumstances of which we have been made aware.

51. For the reasons stated in this Judgment, the Chief Justice`s Order dated 15 January 2007 is affirmed and the Appeal is dismissed.

I agree _____
Nazareth, JA

_____
Evans, JA

I also agree

_____
Forte, JA